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IN THE

Supreme Court of the United States

October Term, 1958

NO. 341

RUBY FREDRICKA SHUTTLESWORTH,
by her next friend,
F. L. SHUTTLESWORTH, et al.,
Appellants,

v.

BIRMINGHAM BOARD OF EDUCATION
OF JEFFERSON COUNTY, ALABAMA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Northern District of Alabama, Southern Division, entered on May 9, 1958, which denied appellants' application for a final injunction to restrain the enforcement of the Alabama School Placement Law, Act No. 201 of the Legislature of Alabama, Regular Session 1955, as amended by Act. No. 367, Regular Session 1957, General Acts of Alabama 1955, p. 492, as amended by General Act 1957, p. 483, and submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Alabama, Southern Division, is not yet reported and is attached hereto as Appendix A.

JURIDICTION

This suit was brought in the United States District Court for the Northern District of Alabama, Southern Division, before a three judge court under 28 U. S. C. Section 2281-2284 to enjoin the Birmingham Board of Education, its members, agents, representatives and employees from enforcing, on grounds of unconstitutionality, the Alabama School Placement Law, Act No. 201 of the Legislature of Alabama, Regular Session, 1955, as amended by Act No. 367, Regular Session 1957, General Acts of Alabama 1955, p. 482, as amended by General Acts 1957, p. 483. The order of the District Court, denying the injunctive relief sought, was entered on May 9, 1958 and Notice of Appeal was filed in that Court on 7th day of July, 1958. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U. S. C. Section 1253 which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any act of congress to be heard and determined by a district court of three judges."

To sustain the jurisdiction of this Court, this case must

be one which properly invoked three-judge jurisdiction under 28 U. S. C. Section 2281. Under the Code provisions, this Court has stated, the three-judge jurisdiction can be invoked only when the claim of unconstitutionality of a state statute is substantial ex parte Poresky, 290 U. S. 30; California Water Service Co. v City of Redding, 304 U. S. 252. Moreover, in recent years, and principally within the 4th and 5th Circuits, the principle has developed that when the claim of unconstitutionality is asserted against a state statute which is *patently* unconstitutional on its face, the interposition of a three-judge court is not required. *Bush v Orleans Parish School Board*, 138 F. Supp. 336 (E. D. La., 1956)————; *Adkins v The School Board of Newport News*, 148 F. Supp. 430 (E. D. Va., 1957)————.

Based upon the theory and thrust of the complaint in the District Court, the appellants initially urged that the Alabama School Placement Law was patently unconstitutional on its face and hence the matter of litigation could be resolved before a single-judge district court. In the alternative, appellants argued that the claim of unconstitutionality was substantial. On this alternative basis, the District Court assumed jurisdiction as a three-judge court. (R-....., App. pp——.)

QUESTIONS PRESENTED

The United States District Court for the Northern District of Alabama has held that the Alabama School Placement Law is constitutional on its face and that it furnishes the legal machinery for the admission of qualified pupils upon a basis of individual merit without regard to their race or color. The questions presented are:

(1) Whether the Alabama School Placement Law is constitutional on its face when considered in the light of legislative history and Sections 2, 3, 4, 5, 7 and 8 of the Act, the related statutes and resolutions of the State affecting public education, and the history of racial segregation and discrimination in Alabama prior and subsequent to the decision in *Brown v Board of Education.*

(2) Whether the District Court is foreclosed from a constitutional determination of alleged unconstitutional criteria for assignment or transfer of pupils under the Alabama School Placement Law where the law contains some admitted-

ly proper criteria.

(3) Whether the District Court, in foreclosing a consideration of the alleged unconstitutional provisions of the Alabama School Placement Law, may nevertheless decide that the Placement Law is constitutional.

(4) Where, prior to *Brown v Board of Education*, State policy compelled segregation of races in public schools, and where, since the Brown decision, pronouncements and actions by the State evidence a continuance of such policy, and the State passes a School Placement Law which may be applied so as to continue segregation, should pupils asserting a denial of their constitutional rights under such law be compelled to wait until that law is applied in accordance with the State's segregation policy before seeking relief in a federal court.

STATUTES INVOLVED

1955 Act and the 1955 Act as amended by the 1957 Act. Act No. 528, Regular Session, 1957, Vol. II, p. 723.

STATEMENT

The principle facts are related succinctly in the opinion of the District Court:

> "The adult and minor plaintiffs are citizens of the State of Alabama, residing in the City of Birmingham. The minor plaintiffs are eligible to attend the public schools of said City. The Birmingham Board of Education is an agency of the State of Alabama and the City of Birmingham charged by law with responsibility for the operation of public schools in said City.
>
> On August 21, 1957, which was two weeks before the beginning of the 1957-58 school term, the adult plaintiffs filed individual petitions with the Birmingham Board of Education requesting "that appropriate and necessary steps be taken to immediately reorganize the school system so as to provide accommodations for our children in schools of the closest proximity to their homes on a nondiscriminatory basis during the 1957-58 term." The Board referred the handling of said petitions to the Superintendent of City Schools, who, on September 9th and 10th, requesting the adult petitioners to present their minor children on Monday, September 16th, to the Guidance Center at Thomas School, located in Birmingham, Alabama, for the purpose of taking tests.

Meantime, under date of August 28, 1957, the State Superintendent of Education[1] wrote a letter to the adult plaintiffs, in which he stated:

> "I urgently recommend that you fully support your local board of education in its decision in the placement of your child in school. * * * As you consider your petition, I ask you to weigh carefully the following:
>
> "1. More people of your race finished high school in Alabama than in any other state in the Union, irrespective of population, even though some other states have more people of your race.
>
> "2. Elementary teachers of your race received higher average annual salaries than the average of the State because of higher training. The teachers of your race in Alabama are better educated than the average of the Nation. Why should you try to take your children away from such highly trained teachers?
>
> "3. A higher percentage of the children of seven to twenty years of age of your race were enrolled in school last year than the State average.
>
> "4. If you have the best conditions in the Nation as set forth in statements 1, 2 and 3 above, why do you want to change the conditions that produced these gains for you and your people?
>
> "5. On August 28, 1956, the people of Alabama voted to change the Constitution of the State, and thereby abolished the right of education or training of any individual at public expense. Under the 1956 Constitutional Amendment, any public school and all public schools can be abolished and the school buildings can be rented or given to individuals to operate private schools. If you refuse to cooperate with the city board

[1] The plaintiffs do not controvert the averments of the defendant's answer to the effect that:

> "* * * the State Superintendent of Education has not been charged by law with a regulation, function, duty or authority with respect to the eligibility or assignment of the minor plaintiffs or with respect to the management or operation of the Birmingham schools in any respect relevant to the issues in this case."

of education in the school placement of your children, you will in effect invite the abolishment of the public schools. Where would your children be, and where would the children of your friends and your people be in this State without public schools?

"6. Your child has many advantages in having a teacher of your race.

"7. I think you will destroy what you already have if you refuse to cooperate with the decision of the local board of education to place your child in the school they think will be best for your child.

"8. As your State Superintendent of Education, I ask that you agree with your local board of education in the school placement of your child."

Instead of presenting their minor children for tests on September 16, the adult petitioners, by mail, requested an interview with the Superintendent of City Schools, which he refused and informed them that it would be necessary first to present the minor children for tests as theretofore requested. On October 7, the minor petitioners were presented and given tests under the auspices of the Guidance Center. During the early part of November, their parents were interviewed by the Superintendent of City Schools. Admitted are averments to the effect that petitioners have requested a "final determination of their rights to attend the schools located within the closest proximity of their homes on a nondiscriminatory and a nonracial basis," but "the Respondents have not rendered an Opinion admitting or denying the request for assignment of the minor petitioners to the schools requested * * *." The present complaint was filed in the district court on December 18, 1957.

By motion to dismiss, and by answer filed without waiving its motion to dismiss, the Birmingham Board of Education presents the following defenses:

I. This Court is without jurisdiction

II. The action is against the State of Alabama, and is prohibited by the Eleventh Amendment to the Constitution of the United States.

III. The plaintiffs have not exhausted their administrative remedies.

IV. The Alabama School Placement Law is

not unconstitutional on its face, and the plaintiffs have not stated or proved a case upon which relief can be granted.

The case was submitted for decision upon the motion to dismiss, and for final decree upon the merits. The plaintiffs introduced in evidence their petitions, the correspondence passing between them and the Superintendent of City Schools, and the letter written to them by the State Superintendent of Education, none of which were controverted. The effect of the undisputed evidence has already been stated. The parts of the complaint denied by the defendant are those alleging discrimination against the plaintiffs, which are substantially quoted in the margin.[2] As to such disputed parts of their complaint, the plaintiffs offer no evidence, but rely entirely upon the judicial knowledge of the Court as to matters of law, the Acts and Resolutions of the Legislature of Alabama,

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"III

[2] "That in the County of Jefferson and the City of Birmingham, your minor Petitioners, as well as other colored minors similarly situated, are being denied admission to public schools situated and lying within the closest proximity of their homes, respectively, solely because they are not being assigned to public schools other than those they were assigned to or would have been assigned to prior to the ruling of the Supreme Court of the United States in *BROWN v. BOARD OF EDUCATION*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, and *BROWN v EDUCATION*, may 31, 1955, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 653, when said prior assignments to public schools were based almost solely on racial discrimination. This policy of assignment of colored and white pupils to public schools, separated on the basis of race, has been continued and perpetuated since the ruling of the United States Supreme Court in Brown v. Board of Education, Supra, by Legislation passed by the Alabama Legislature declaring as a State policy that:

"'. . . . the decision and orders of the Supreme Court of the United States relating to the separation of races in public schools are, as a matter of right, null, voird, and of no effect and the Legislature of Alabama declares to all men as a matter of right, this State is not bound thereby.'

ACT NO. 42, SPECIAL SESSION, 1956, of the Alabama Legislature, effective February 2, 1956.

* * * * *

"V."

"3. The effect of the above stated provision (Section 2 of Act No. 201) of the Placement Law of Alabama froze the Petitioners in public schools providing for the separation of white and colored pupils irrespective of the nearness of a public school to the Petitioners' respective homes and without any consideration as to the availability of school facilities.

"4. * * * * *

It is obvious that this Alabama Placement Law, being challenged here as to its constitutionality requires the Board of Education to take into consideration, conditions expressly prohibited as reasons for delaying an early and immediate compliance with the United States Supreme

and the history of the period immediately preceding and following the enactment of the Alabama School Placement Law. The ultimate contentions of the plaintiffs are that the Alabama School Placement Law discriminates against them on account of their race or color, and that said law is unconstitutional on its face." (R.—— to ——; App. pp.——.)

THE QUESTIONS ARE SUBSTANTIAL

1. THE ALABAMA SCHOOL PLACEMENT LAW DENIES EQUAL PROTECTION OF LAWS.

a. The Purpose and Intent of the Alabama School Placement Law is to subvert the Constitutional Rights declared by this court in the school segregation cases.

Prior to *Brown v Board of Education*, 347 U. S. 483, the State of Alabama, anticipating a decision adverse to its constitutional and statutory policy of segregation of races, which policy and practice had existed since 1868,[3] appointed

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Court's ruling in Brown v Board of Education, Supra, declaring the fundamental principles that racial discrimination in public education is unconstitutional and in the May 31, 1955 Opinion in Brown V. Board of Education, Supra, ruling that all provisions of Federal, State or local law requiring or permitting such discrimination must yield to this principle * * *.

"VI

"That the Petitioners and those similarly situated are affected adversely and are presently suffering irreparable injury and will continue in the future to suffer irreparable injury by reason of Act No. 201, passed by the Alabama Legislature in its Regular Session in 1955 and became an Act on August 3, 1955 without approval by the Governor requiring local School Boards to carry out a State Policy set forth in said Act and prohibiting their School Boards to act in regards to requests for transfer to schools situated within a closer proximity of their homes relative to the respective Petitioners and others similarly situated without considering an endless list of indefinite factors, a greater portion of which are expressly rejected as an improper consideration for delaying immediate compliance with the United States Supreme Court's ruling in Brown v Board of Education declaring that racial discrimination in public schools is unconstitutional.

"That the effect upon Local School Boards in trying to comply with the provisions of said School Placement Law has resulted in the Respondent School Board prohibiting the Petitioners and others similarly situated, from attending the public schools of Birmingham, Alabama on a nonracial discriminating basis in violation of their right secured by the Fourteenth Amendment of the United States Constitution and declared by the Supreme Court of the United States in its Opinion in Brown v Board of Education, Supra, and other School Segregation cases."

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[3] Pursuant to constitutional authority, the Board of Education passed "An Act to Provide Separate Schools; approved August 11, 1868," Alabama Laws, 1868, p. 148; and in 1875 the Constitution was amended to incorporate requirement for separate schools (Article XII, Sec. 1). The provision was carried forth into the Alabama Constitution of 1901, Sec. 256.

an Interim Committee to prepare "such legislation, including submission of constitutional amendments, as may be required, to protect the interest of the state and its citizens in the event of a decision by the Supreme Court of the United States which destroys or impairs the principle of separation of the races in the public schools of this STATE." Senate Joint Resolution No. 149, adopted September 21, 1953, Acts 1953, p. 1201 following the Brown decisions, the INTERIM COMMITTEE made its report to the Alabama Legislation in 1955, proposing: That the Constitutional provision against prohibition of mixed schools be eliminated; that it be made clear that the state will not compel attendance at mixed schools and will not be obligated to operate mixed schools; and that the greatest possible freedom should be given to the Legislature "to provide or authorize the SCHOOL BOARDS to provide for the various sections in ways better suited to local conditions, after local authorities have exercised their screening power to avoid impairment of educational function, social friction, and potential disorder inconsistent with the education of youth." The report of Alabama Interim Legislative Committee on segregation in the public schools, legislative Document No. 1, Regular Session, 1955.

At the same Session the Legislature of Alabama adopted the original School Placement Act. (ACT NO. 201, GEN. ACTS, 1955, p. 492). That Act repealed the provision of the Alabama Code relating to the separation of races and compulsory school attendance and provided an elaborate and complex scheme for the placement of pupils according to certain standards set forth in the Act (App.—— pp.——).

That following year, 1956, at the first Special Session of the Legislature, the Resolution of Interposition and Nullification was passed (ACT NO. 42, effective February 2, 1956, SPECIAL SESSION, 1956). It is significant to note that the Resolution declared, "The Supreme Court of the United States asserts for its part, that the states did in fact, in 1868, upon the adoption of the Fourteenth Amendment, prohibit unto themselves the power to maintain racially separate public institutions; the State of Alabama, for its part, asserts that it and its sister states have never surrendered such

right * * *."

The Resolution reads in part, "* * * until the issue between the State of Alabama and the general government is decided by the submission to the States pursuant to Article Five of the Constitution, of a suitable Constitutional Amendment that would declare in plain unequivocable language, that the States do surrender their power to maintain public schools and other public facilities on a basis of separation as to race, the legislature of Alabama declares the decision and orders of the Supreme Court of the United States relating to separation of races in the public schools are as a matter of right, null, void, and of no effect; and the legislature of Alabama declares to all men as a matter of right, this State is not bound to abide thereby; we declare further, *our firm intention to take all appropriate measures honorably and constitutionally available to us to avoid this illegal encroachment upon our rights, and to urge upon our sister states their prompt and deliberate efforts to check further encroachment by the general government, through judicial legislation, upon the reserve power of all states.*" (App.—— pp.——.)

During the same Session, ACT NO. 82, effective February 7, 1956, ACTS, SPECIAL SESSION, 1956, p. 119, was passed. The Act proposed as amendments to the Constitution, the elimination of the constitutional requirements of separate schools. The authorization to the legislature to constitute members and employees of school boards as judicial officers, provided that all action taken by such members and employees requiring the exercise of discretion or judgment be considered judicial action and provided that schools may be provided for separate races, and that the minors may make an election to that end.

The proposed amendments were adopted by the people of Alabama in an election held August 28, 1956. On April 14, 1956, by Act No. 117, Special Session, certain amendments were made to the Code of Alabama (1940). Section 93 of Title 52 was amended to provide that the County Board of Education shall provide separate schools for white and colored children whose parents voluntarily elect that such children attend schools with members of their own race. Section 167

of Title 52 was amended to provide that City Boards of Education shall determine on the recommendation of the City Superintendent of Schools, and subject to the provisions of this title the educational policy of the city and shall prescribe rules and regulations for the conduct and management of the City Schools; and that the Board shall provide free schools for all children over 6 years of age and shall provide separate schools for white and colored children whose parents voluntarily elect that such children attend schools with members of their own race. Section 297 of Title 52 was amended to provide that every child between the age of 7 and 16 shall be required to attend school, public or otherwise, and that admission to public schools shall be on an individual basis on the application of the parents and that each child, through his parents, shall have the right to choose whether or not he shall attend a school provided for members of his own race. By the 1957 Amendment to the School Placement Law, Act No. 367, Regular Session, 1957, Sections 93 and 167 of Title 52 were repealed. It does not appear of record, however, that Section 297 was repealed.

At the Regular Session in 1957, the School Placement Law was amended to implement the amended constitutional provisions. (ACT NO. 367, effective August 26, 1957, ACTS, REGULAR SESSION, 1957, VOL. 1, p. 482.) This Act is the School Placement Law which is now in effect in Alabama.

Subsequently, and within the same year, the Legislature passed ACT NO. 528, REGULAR SESSION, 1957, VOL. 2, p. 723. That Act authorizes local school boards to discontinue the operation of any school board, the operation of which is found to be threatened by such tension, friction, or potential disorder or ill-will within the school as substantially to impair effective standards or objectives of education of its pupils, or by potential impairment of peace, order and goodwill in the community (App.——, pp.——).

It is a well established principle that in determining the constitutionality of legislation, a court should examine the legislative history of the same to ascertain the legislative purpose and intent and that acts in pari materia should be construed together. Statutes having the same general pur-

pose, relating to the same class of subjects, constituting parts of the same general plan, and aimed at the accomplishment of the same results are all considered together. *Adkins v School Board of Newport News*, 148 Fed Supp. 430, aff'd 246 Fed. 2d, 325 (4th Cir. 1957); cert. denied—U. S.—78 S. Ct. 83; *Davis v Schnell*, 81 Fed. Sup. 872 aff'd 336 U. S. 933, 93 L. Ed. 1093, 69 Sup. Ct. 749.

If we consider the Interim Committee's report of 1955, and the subsequent enactment of the 1955 School Placement Law, the calling of a Special Session of the Legislature in 1956, and its actions in passing a Resolution of Interposition and Nullification declaring the decisions of the Supreme Court of the United States on school segregation cases null and void and of no effect in Alabama, and the further action of the Special Session in passing of an Act proposing extensive amendments to the Constitution of Alabama and enacting the Acts of April 14, 1956, and the eventual passage of the amended School Placement Law of 1957, together with the Act empowering the local school boards to close the schools of Alabama, where there is potential friction or ill-will within the school or the community, the whole intent and purpose of the School Placement Law becomes crystal clear. That intent and purpose is to subvert the constitutional principle declared in the segregation cases and to prevent nonsegregated public education in Alabama at all costs.

We reject the District Court's view that these matters merely concern motive, and we submit that this history of the School Placement Law and the climate in which it was born demonstrates its purpose and intent. *Adkins v School Board of Newport News*, Supra; *Davis v Schnell*, Supra. Appellants further reject the District Court's opinion as to the significance of the Resolution of Interposition and Nullification. Conceding that it was without the force of law, it was nevertheless a solemn act of the Legislature—not merely a protest of misguided men. It is a declaration of policy of the State of Alabama (See Adkins v School Board of Newport News).

b. The presumption of the constitutionality of the Alabama School Placement Law is limited.

Although it is well settled that the enactment of legislation

carries with it a presumption of constitutionality, the appellants reject the court's broad application of this doctrine. The School Placement Law purports to regulate the transfer of students from a segregated system of schools to a nonsegregated system of schools and therefore it may curtail or limit the exercise of the student's constitutional right to attend public schools on a nonsegregated basis as declared by this court. Viewed in the background of the constitutional and statutory policy and practice of segregation in Alabama prior to 1954 and the legislative history of the School Placement Law, the Placement Act must fall within that class of statutes which are immediately suspect and should be subjected to the most rigid scrutiny. *Korematsu v United States*, 323 U. S. 214, 216; ex parte endo, 323, U. S. 283, 299.

c. The Alabama School Placement Law is unconstitutional on its face.

The practical operation of this statute is unique to say the least. Although Alabama has eliminated from its constitution and statutes express language designating a segregated system of public schools, Section 2 and 3 of the Placement Act continues to compel the separation of races in the public schools by freezing the segregated system which existed under the repealed laws.

Section 4 of the Act purports to be a means whereby a child may escape the unconstitutional restrictions to segregated public schools. Since this Section is only applicable where a child seeks assignment or transfer, it imposes, by requiring certain special tests and qualifications, an unequal burden upon those students who seek to exercise their constitutional right to attend nonsegregated public schools. This is within itself, a denial of equal protection of the laws.

Moreover, Section 4 contains criteria which when read in light of the background of the Placement Law and the decisions of this court, has relevancy only in connection with race and is therefore unconstitutional. In *Brown v Board of Education*, 347 U. S. 483, this court decided that notwithstanding the quality of the physical plant, curricular and other tangible factors, the sociological and psychological effects upon the school child made the separation of races in

the public schools inherently unequal. In the second decision of the *Brown* case, 349 U. S. 294, this court declared that all provisions of Federal, State or Local law requiring or permitting such discrimination must yield to the principle that racial discrimination in public education is unconstitutional. This court further stated the vitality of these principles cannot be allowed to yield simply because of disagreement with them.

Under Section 4, local school boards, in acting upon requests for transfer or assignment, must take into consideration: (1) the psychological qualification of the pupil for the type of teaching and association involved; (2) the physical effect upon the pupil of attendance at a particular school; (3) the possibility or threat of friction or disorder among pupils or others; (4) the possibility of breaches of the peace or ill-will or economic retaliation with the community; (5) the home environment of the pupil; (6) the maintenance or severance of established social and psychological relationships with other pupils and with teachers.

This court has said that because of the separation of races the Negro student has been injured sociologically and psychologically and hence there are sociological and psychological differences between the two races; nevertheless, Section 4 requires a student to meet sociological and psychological standards of equality in order to effectuate a transfer. In other words, the psychological and sociological differences that have resulted from compulsory segregation in public education is under this statute a means for preventing the exercise of the constitutional rights to attend nonsegregated public schools. In a word, the statutes substituted the difference already created for the term "race." And of grave constitutional significance is the fact that under Section 4, local school boards are required to yield to community pressure[4]

[4] Since 1954 only one Negro child has been admitted to a public school on a Non-segregated basis and in that instance, the county board of education withdrew the Negro child because of community pressure. Race Rel. L. Rep. 255 (1956).

The mere fact that Section 4 makes no mention of race is immaterial. The Fourteenth Amendment, like the Fifteenth, "nullifies sophisticated as well as simple-minded modes of discrimination." *Lane v Wilson*, 307 U. S. 268, 273; *Smith v Allwright*, 321 U. S. 649; *Guinn v United*, 238 U. S. 347; *Davis v Schnell*, 81 F. Supp. 872, aff'd 336 U. S. 933.

Without extended discussion and without conceding that any provision of the Act is constitutional, the appellants contend that Sections 5, 7 and 8 are unconstitutional. Sections 5 and 8 when read together, *permit* the continuation of segregated schools, contrary to the principle this court announced in the second *Brown* decision.

Section 7 demonstrates the inadaquacy of the administrative procedure established under the Act. The Section makes it practically impossible for the board to reach a decision seasonably. No final order of the board may be entered until each member of the board has personally considered the entire record. Hence with hearings, investigations, and personal consideration of the record in each individual case and with no time limitation within which the board must act, and likewise, no legal means of compelling board action, the proceedings before the board within the framework of the Act are delusive, and as well, subversive of the constitutional principles. Onerous procedural requirement which effectively handicap the rights of those seeking the protection of the Fourteenth Amendment are condemned (*Lane v Wilson*, 307 U. S. 268).

Since the *Brown* decisions some ten states have enacted School Placement or Pupil Assignment Laws[3] in various forms. Excluding the present case there have been at least three (3) cases in which the constitutionality of a School Placement or Pupil Assignment Law has been question. In *Carson v Warlick*, 238 Fed (2d), 724 (4th Cir. 1956) the

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[3] Ala. Acts 1955, No. 201 and 1957, No. 367, General Acts 1955, p. 492, General Acts 1957, p. 483 (Pocket Part, Ala. Code, 1940, Tit. 52, Secs. 61, et seq.); Ark. Stat. Ann. Secs. 80-1519 to -1525 (Supp. 1957); Fla. Stat. Ann. Sec. 230, 231 (Supp. 1956); Miss. Code Ann. Secs. 6334-01 to -08 (Supp. 1956); N. C. Gen. Stat. Secs. 115-176 to -179 (Supp. 1955), as amended, 1956 Extra Sess. Laws, 1 Race Rel. L. Rep. 939 (1956); S. C. Code Sec. 21-230, 21-247 to -247.7 (Supp. 1956); Tenn. Pub. Acts 1957, c. 13; Tex. Sess. Laws 1957, c. 287; Va. Code Ann. Secs. 22-232.1 to 232.16 (Add. Supp. 1956).

School Placement Law of North Carolina was held to be constitutional. But in *Orleans Parish School v Bush*, 242 Fed. (2d), 156 (5th Cir. 1957) and in *Adkins v School Board of Newport News*, 148 Fed. Supp. 430, aff'd 246, Fed (2d) 325 (4th Cir. 1957) the Louisiana and Virginia Pupil Placement Laws were held unconstitutional on their face. In all three cases, this court denied certiorari.

The appellants reject the conclusion of the district court that the Alabama statute is similar to that of North Carolina and urge that when the Alabama School Placement Law is read together with the statute providing for the closing of public schools, it is in every pertinent aspect similar to the history and provisions of the Virginia statue and hence the considered views in *Adkins v School Board of Newport News*, supra, should be controlling and determinative.

2. THE DISTRICT COURT CANNOT FORECLOSE ITSELF FROM CONSIDERING THE UNCONSTITUTIONALITY OF A STATE STATUTE IN ONE BREATH, AND IN ANOTHER DECLARE THE SAME STATUTE TO BE CONSTITUTIONAL UNDER THE PRETENSE OF APPLYING THE FEDERAL EQUITABLE ABSTENTION DOCTRINE.

a. The application of the Federal Equitable Abstention Doctrine would not have required a dismissal of the actions or a determination on the merits but instead, would have relegated the plaintiffs to pursue their actions in the state courts while the district court, retaining jurisdiction would have stayed these proceedings. *Texas v Pullman Company*, 312, U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941); *Government and Civic Employees Committee, CIO v Windsor*, 353 U. S. 364, 77 S. Ct., 838, 1 L. Ed. 2d 894 (1957).

To have required the plaintiffs to seek the Alabama Supreme Court's interpretation of the School Placement Law before a determination as to its unconstitutionality by the federal court, would have denied plaintiffs the relief which was recognized in the first portion of the trial court's opinion, to-wit; exhaustion of the long complex so-called administrative and judicial remedies under the statute.

While the trial court foreclosed itself from a consideration

of the unconstitutionality of the statute because the Supreme Court of Alabama had failed to interpret said statute as observed in its opinion, [4] it nevertheless, declared the Alabama Placement Law constitutional and granted the relief prayed for by the defendant.[5]

While it is contended that the abstention doctrine requires state courts to pass first upon cases involving the unconstitutionality of a state statute, nevertheless, this court has recognized a limitation of the application of this doctrine. As we pointed out in *Alabama Public Service Commission v Southern Railroad Company*, 341 U. S. 341, 344, (1951), proceedings in a federal trial court should be stayed only where there is involved "construction of a state statute so ill defined that a federal court should hold the case pending a definitive construction of that statute in state courts." And as was observed by Mr. Justice Douglas in his dissent on the ground that the statute was clear and unambiguous as applied to the particular plaintiffs, and the questions involved did not turn upon "any niceties in the interpretation involved did not turn upon "any niceties in the interpretation of the Michigan law," *Albertson v Millard*, 345 U. S. 242, 73 S. Ct. 600, 97 L. Ed. 983 (1953). It is the contention of the plaintiffs that the Alabama Placement Law is not ambiguous as to its meaning nor as to its application to the plaintiffs involved and therefore we must reject the application of the absention doctrine as was apparently, in fact, rejected by the trial court itself in that, said court failed to stay the proceedings as would have been the court's action in applying the doctrine, but instead ruled on the merits and rendered an opinion in favor of the defendant.

As was held in *Propper v Clark*, 337 U. S. 472, 492:

> "The submission of special issues is a useful device in judicial administration in such circumstances as existed in the Magnolia Case, 309 U. S. 478, 84 L. Ed. 876, 60 S. Ct. 628, 42 Am. Bankr. N. S. 216; Spector Case, 323 U. S. 101, 89 L. Ed. 101, 65 S. Ct. 152; Fieldcrest Case, 316 U. S. 168, 86 L. Ed. 1355, 62 S. Ct. 986, and the Pullman Case, 312 U. S. 496, 85 L. Ed. 971, 61 S. Ct. 643, all supra, but in the absence of special circumstances, 320 U. S. at 236, 237, 88 L. Ed. 14, 15, 64 S. Ct. 7, it is not to be used

> to impede the normal course of action where federal courts have been granted jurisdiction of the controversy.
>
> We reject the suggestion that a decision in this case in the federal courts should be delayed until the courts of New York have settled the issue of state law."

See also, *Public Utilities Commission v United Fuel Gas Company*, 317 U. S. 456, 468-469; *Romero v Weakley*, 226 F 2d 399 (9th Cir., 1955); Cf. *Hillsboro Township v Cromwell*, 326 U. S. 620, 628-9; *Mitchell v Wright*, 154 F 2d 924 (5th Cir., 1946). As on the uncontradicted facts and the clear law, the statute involved here is unconstitutional upon its face and should have been declared so by the trial court. The plaintiffs should have been granted the injunctive relief prayed for.

We believe therefore, that the questions presented by the appeal are substantial and that they are of public importance.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1958

NO. 341

RUBY FREDRICKA SHUTTLESWORTH,
by her next friend,
F. L. SHUTTLESWORTH, et al.,

Appellants,

v.

BIRMINGHAM BOARD OF EDUCATION
OF JEFFERSON COUNTY, ALABAMA,

Appellee.

Appendixes

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

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UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

CIVIL ACTION NO. 8914

RUBY FREDRICKA SHUTTLESWORTH, a minor, by her next friend, F. L. SHUTTLESWORTH; DENISE ARMSTRONG, a minor, by her next friend, JAMES ARMSTRONG; WATHAW AVERY, a minor, by his next friend, WATHAW AVERY, SR.; and NATHANIEL LEE HORTON, a minor, by his next friend, ANNIE L. HORTON,
PLAINTIFFS,

versus

BIRMINGHAM BOARD OF EDUCATION OF JEFFERSON COUNTY, ALABAMA,
Defendant.

(Filed in Clerk's Office May 9, 1958. William E. Davis, Clerk, U. S. District Court)

Before RIVES, Circuit Judge, and LYNNE and GROOMS, District Judges.

RIVES, Circuit Judge:

Four Negro school children, by their parents and next friends, bring this class action, on behalf of themselves and those similarly situated, to test the constitutionality of the Alabama School Placement Law,[1] and to enjoin the Birmingham Board of Education, its members, agents, representatives and employees from enforcing said School Placement Law, and from refusing, "solely on the basis of race or color or resentment by others," to permit the four plaintiff Negro children and others similarly situated to attend or transfer to a public school situated closer to their respective homes

[1] Act No. 201 of the Legislature of Alabama, Regular Session 1955, which became an Act on August 2, 1955, as amended by Act No. 367, Regular Session 1957, which became an Act on August 26, 1957, General Acts of Alabama 1955, p. 492, as amended By General Acts 1957, p. 483.

than the schools to which they are now assigned.

The adult and minor plaintiffs are citizens of the State of Alabama, residing in the City of Birmingham. The minor plaintiffs are eligible to attend the public schools of said City. The Birmingham Board of Education is an agency of the State of Alabama and the City of Birmingham charged by law with responsibility for the operation of public schools in said City.

On August 21, 1957, which was two weeks before the beginning of the 1957-58 school term, the adult plaintiffs filed individual peitions with the Birmingham Board of Education requesting "that appropriate and necessary steps be taken to immediately reorganize the school system so as to provide accommodations for our children in schools of the closest proximity to their homes on a nondiscriminatory basis during the 1957-58 term." The Board referred the handling of said petitions to the Superintendent of City Schools, who, on September 9th and 10th, requesting the adult petitioners to present their minor children on Monday, September 16th, to the Guidance Center at Thomas School, located in Birmingham, Alabama, for the purpose of taking tests.

Meantime, under date of August 28, 1957, the State Superintendent of Education[2] wrote a letter to the adult plaintiffs, in which he stated:

> "I urgently recommend that you fully support your local board of education in its decision in the placement of your child in school. * * * As you consider your petition, I ask you to weigh carefully the following:
>
> "1. More people of your race finished high school in Alabama than in any other state in the Union, irrespective of population, even though some other states have more people of your race.
>
> "2. Elementary teachers of your race received higher average annual salaries than the average of

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[2] The plaintiffs do not controvert the averments of the defendant's answer to the effect that:

> "*** the State Superintendent of Education has not been charged by law with any regulation, function duty or authority with respect to the eligibility or assignment of the minor plaintiffs or with respect to the management or operation of the Birmingham schools in any respect relevant to the issues in this case."

the State because of higher training. The teachers of your race in Alabama are better educated than the average of the Nation. Why should you try to take your children away from such highly trained teachers?

"3. A higher percentage of the children of seven to twenty years of age of your race were enrolled in school last year than the State average.

"4. If you have the best conditions in the Nation as set forth in statements 1, 2, and 3 above, why do you want to change the conditions that produced these gains for you and your people?

"5. On August 28, 1956, the people of Alabama voted to change the Constitution of this State, and thereby abolished the right of education or training of any individual at public expense. Under the 1956 Constitutional Amendment, any public school and all public schools can be abolished and the school buildings can be rented or given to individuals to operate private schools. If you refuse to cooperate with the city board of education in the school placement of your children, you will in effect invite the abolishment of the public schools. Where would your children be, and where would the children of your friends and your people be in this State without public schools?

"6. Your child has many advantages in having a teacher of your race

"7. I think you will destroy what you already have if you refuse to cooperate with the decision of the local board of education to place your child in the school they think will be best for your child.

"8. As your State Superintendent of Education, I ask that you agree with your local board of education in the school placement of your child."

Instead of presenting their minor children for tests on September 16, the adult petitioners, by mail, requested an interview with the Superintendent of City Schools, which he refused and informed them that it would be necessary first to present the minor children for tests as theretofore requested. On October 7, the minor petitioners were presented and given tests under the auspices of the Guidance Center. During the early part of November, their parents were interviewed by the Superintendent of City Schools. Admitted are

averments to the effect that petitioners have requested a "final determination of their rights to attend the schools located within the closest proximity of their homes on a nondiscriminatory and a nonracial basis," but "the Respondents have not rendered an Opinion admitting or denying the request for assignment of the minor Petitioners to the schools requested * * *." The present complaint was filed in the district court on December 18, 1957.

By motion to dismiss, and by answer filed without waiving its motion to dismiss, the Birmingham Board of Education presents the following defenses:

I. This Court is without jurisdiction.

II. The action is against the State of Alabama, and is prohibited by the Eleventh Amendment to the Constitution of the United States.

III. The plaintiffs have not exhausted their administrative remedies.

IV. The Alabama School Placement Law is not unconstitutional on its face, and the plaintiffs have not stated or proved a case upon which relief can be granted.

The case was submitted for decision upon the motion to dismiss, and for final decree upon the merits. The plaintiffs introduced in evidence their petitions, the correspondence passing between them and the Superintendent of City Schools, and the letter written to them by the State Superintendent of Education, none of which were controverted. The effect of the undisputed evidence has already been stated. The parts of the complaint denied by the defendant are those alleging discrimination against the plaintiffs, which are substantially quoted in the margin.[3] As to such disputed parts of their

[3] "That in the County of Jefferson and the City of Birmingham, your minor Petitioners, as well as other colored minors similarly situated, are being denied admission to public schools situated and lying within the closest proximity of their homes, respectively, solely because they are not being assigned to public schools other than those they were assigned to, or would have been assigned to prior to the ruling of the Supreme Court of the United States in BROWN v. BOARD OF EDUCATION, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, and BROWN v. EDUCATION, May 31, 1955, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 653, when said prior assignments to public schools were based almost solely on racial discrimination. This policy of assignment of colored and white pupils to public schools, separated on the basis of race, has been continued and perpetuated since the ruling of the United States Supreme Court in Brown v Board of Education, Supra, by Legislation passed by the Alabama Legislature declaring as a State policy that:

complaint, the plaintiffs offer no evidence, but rely entirely upon the judicial knowledge of the Court as to matters of law, the Acts and Resolutions of the Legislature of Alabama, and the history of the period immediately preceding and fol-

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" ' . . . . the decision and orders of the Supreme Court of the United States relating the separation of races in public schools are, as a matter of right, null void, and of no effect and the Legislature of Alabama declares to all men as a matter of right, this State is not bound thereby.'

ACT NO. 42, SPECIAL SESSION, 1956, of the Alabama Legislature, effective February 2, 1956.

* * * * * *

"V.

"3 The effect of the above stated provision (Section 2 of Act No. 201) of the Placement Law of Alabama froze the Petitioners in public schools providing for the separation of white and colored pupils irrespective of the nearness of a public school to the Petitioners' respective homes and without any consideration as to the avaliability of schools facilities.

"4. * * * * *

It is obvious that this Alabama Placement Law, being challenged here as to its constitutionality, requires the Board of Education to take into consideration, conditions expressly prohibited as reasons for delaying an early and immediate compliance with the United State Supreme Court's ruling in Brown v Board of Education, Supra, declaring the fundamental principle that racial discrimination in public education is unconstitutional and in the May 31, 1955 Opinion in Brown v Board of Education, Supra, ruling that all provisions of Federal, State or local Law requiring or permitting such discrimination must yield to this principle * * *.

"VI

"That the Petitioners and those similarly situated are effected adversely and are presently suffering irreparable injury and will continue in the future to suffer irreparable injury by reason of Act No. 201, passed by the Alabama Legislature in its Regular Session in 1955 and became an Act on August 3, 1955 without approval by the Governor requiring local School Boards to carry out a State Policy set forth in said Act and prohibiting their School Boards to act in regards to requests for transfer to schools situated within a closer proximity of their homes relative to the respective Petitioners and other similarly situated without considering an endless list of indefinite factors, a greater portion of which are expressly rejected as an improper consideration for delaying immediate compliance with the United States Supreme Court's ruling in Brown v Board of Education declaring that racial discrimination in public schools is unconstitutional.

"That the effect upon Local School Boards in trying to comply with the provisions of said School Placement Law has resulted in the Respondent School Board prohibiting the Petitioners and others similarly situated, from attending the public schools of Birmingham, Alabama on a nonracial discriminating basis in violation of their right secured by the Fourteenth Amendment of the United States Constitution and declared by the Supreme Court of the United States in its Opinion in Brown v Board of Education, Supra, and other School Segregation cases."

lowing the enactment of the Alabama School Placement Law. The ultimate contentions of the plaintiffs are that the Alabama School Placement Law discriminates against them on account of their race or color, and that said law is unconstitutional on its face.

I. JURISDICTION OF THE COURT.

That federal jurisdiction exists in some district court under one or more of the Sections cited in the margin,[1] requires no discussion. The disputed issue of jurisdiction relates to the three-judge court. A substantial federal constitutional question is necessary to invoke the jurisdiction of a three-judge district court under 28 U. S. C. A. Sec. 2281. The Louisiana pupil assignment law was held to be so clearly and patently unconstitutional on its face as not to require the interposition of a three-judge court. *Bush v Orleans Parish School Board*, E.D. La. 1956, 138 F. Supp. 336. The Supreme Court denied leave to file a petition for writ of mandamus, 351 U.S. 948. There, Article 12, Sec. 1 of the Louisiana Constitution had been adopted in 1954 making segregation through the exercise of the police power part of the constitutional law of that State. Act 555 of 1954 had implemented that constitutional requirement by providing that: "All public elementary and secondary schools in the State of Louisiana shall be operated separately for white and colored children." The next numbered Act 556 of 1954 was the Louisiana pupil assignment law. Both the three-judge court, 138 F. Supp. 336, and the one-judge district courts, 138 F. Supp. 337, 341, thought the pupil assignment law plainly unconstitutional on its face. In affirming the judgment of the one-judge district court, the Court of Appeals for the Fifth Circuit said in part:

> "Whatever might be the holding as to the validity of an administrative pupil assignment statute containing reasonably certain or ascertainable standards to guide the official conduct of the superintendent of the local school board and to afford the basis for an effective appeal from arbitrary action, Act 556 is not such a statute. The plaintiffs, seeking to assert their right to attend nonsegregated schools as guaranteed them under the Constitution, would be

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[1] 28 U. S. C. A. 1331, 28 U. S. C. A. 1343 and 42 U. S. C. A. 1983.

remitted to an administrative official guided by no defined standards in the exercise of his discretion.

"8. *Cf. Carson v Warlick*, 4 *Cir.*, 238 *F. 2d* 724; *the North Carolina Pupil Enrollment Act there involved was held by the court to contain adequate standards.*"

Orleans Parish School Board v Bush, 5 Cir. 1957, 242 F. 2d 156, 164.

Likewise, the Virginia Pupil Placement Law was held to be so patently unconstitutional on its face as not to call for a three-judge court. *Adkins v School Board of the City of Newport News*, E. D. Va. 1957, 148 F. Supp. 430, 446. In affirming the judgment in that case, the Court of Appeals for the Fourth Circuit said in part:

> "* * * As pointed out by the judge below, * * this statute furnishes no adequate remedy to plaintiffs because of the fixed and definite policy of the school authorities with respect to segregation and because of the provisions of chapter 68 of the Acts of the Extra Session, which provide for the closing of schools and withdrawal therefrom of state funds upon any departure from this policy in any school. Orleans Parish School Board v. Bush, 5 Cir., 242 F. 2d 156, 162, certiorari denied 77 S.Ct. 1380."

School Board of City of Newport News, Va. v. Atkins, 4th Cir. 1957, 246 F. 2d 325, 326-327.

On the other hand, the North Carolina Pupil Enrollment Act was held to contain adequate standards. *Carson v Warlick*, 4th Cir. 1956, 238 F. 2d 724.

The present plaintiffs requested that a three-judge district court be convened to hear this case. Their able counsel well understood the distinguishing characteristics of a case calling for a three-judge court, and stated upon oral argument:

> "* * * We argue two things. One, it might be unconstitutional on its face, it is patently unconstitutional. Two, its constitutionality is doubtful. That is why we asked for a three-judge court because otherwise we would only need a single judge. So it is on two basis, patently on its face and doubtful constitutionality."

That the plaintiffs were well adviced in taking the positions that the statute is not so plainly unconstitutional as were the

Louisiana Act and the Virginia Act, and that a three-judge court is necessary, would appear more clearly when we come to discuss the constitutionality of the Act itself. For the present, it is enough to say that we think that a substantial federal consitutional question is presented, and that a three-judge court has jurisdiction. If we are in error in that view, the judgment to be rendered will, nevertheless, be valid as the act of a district court of one judge, since all three judges concur. Browder v Gayle, M. D. Ala. 1956, 142 F. Supp. 707, 713, and cases cited in footnote 10, affirmed 352 U. S. 903.

II. Eleventh Amendment.

The contention that the action is against the State of Alabama is precisely analogous to that raised by the Orleans Parish School Board and decided against it in *Orleans Parish School Board v Bush*, 5th Cir. 1957, 242 F. 2d 156, 160, 161. It is not necessary to repeat what was there said.

III. Exhaustion of Administrative Remedies.

Section 7 of the Alabama School Placement Law provides in part:

> "A parent or guardian of a pupil may file in writing with the local Board objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated by the Board. Unless a hearing is requested, the Board shall act upon the same within 30 days, stating its conclusion. * * *."

The petitions filed with the Board on August 21, 1957, when coupled with the subsequent tests and interviews, all occurring prior to the middle of November, were certainly sufficient to request "in writing assignment or transfer to a designated school or to another school to be designated by the Board." No hearing was requested. The Board had to act, "stating its conclusion," within 30 days. When it did not do so, the plaintiffs had exhausted their administrative remedies, and were free to seek relief in the courts.

IV. The Merits. Are Plaintiffs Entitled to Relief?

In seeking an injunction on the ground that the Alabama School Placement Law is unconstitutional on its face as contrasted with being unconstitutional in its application, the plaintiffs have assumed a heavy burden indeed. In the first

place, for them to have any standing to attack that law, it must be the source of the authority by virtue of which they are prevented from attending the schools of their choice. See Ex parte Bransford, 310 U. S. 354, 361. The defendant points to the general authority vested in the Board of Education by another statute in effect in Alabama ever since the enactment of the 1927 School Code; providing in part that: "The General administration and supervision of the public schools and educational interests of each city shall be vested in a city board of education * * *." Code of Alabama 1940, Title 52, Sec. 151: see also Section 158 of the same Title.

By virtue of its authority to administer and supervise the public schools, the defendant Board might provide for the assignment of pupils to particular schools upon any reasonable and legitimate basis. See 79 C. J. S. Schools and School Districts, Sec. 450. As was said by the writer when speaking as the organ of the Court of Appeals for the Fifth Circuit:

> "The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools. Avery v Wichita Falls Independent School District, 5 Cir., 1957, 241 F. 2d 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason, but each child is entitled to be treated as an individual without regard to his race or color."

Borders v Rippy, 5 Cir. 1957, 247 F. 2d 268, 271.

The defendant Board simply failed either to admit or to deny the request for assignment of the minor plaintiffs to the schools requested, without assigning any reason for such nonaction. Should we proceed on the assumption that it failed to act for some reasonable and legitimate reason permitted by the pre-existing law, or should we hold that its authority is referable to the Alabama School Placement Law, and that its nonaction is based upon some one or more of the grounds specified in that law? The question is not free from difficulty, but under the circumstances of this case, we conclude that the latter alternative furnishes the fairer and sounder answer

for several reasons. In the first place, the Board had a duty to act within the 30 days specified by the Placement Law, or promptly in any event, if the law be not regarded. The defendant Board could not better its position by failing to comply with duty. In the second place, the Board does not in its answer disclaim the Placement Law as the source of its authority, but, to the contrary, stoutly defends the constitutionality of that law. Finally, the Board's agent, the Superintendent of City Schools, in his letter of November 18, 1957, addressed to the plaintiffs' attorney said: "The Board of Education is complying with the provisions of the Alabama laws with reference to the assignment of pupils." The Alabama law having specific reference to the assignment of pupils is the School Placement Law. As we read the Superintendent's letter, it virtually admits that the Board was acting under the authority granted by that law.

Having overcome that hurdle, however, the plaintiffs face the higher obstacle of showing that they cannot attend the schools of their choice because of their race or color, and that such denial of their constitutional rights is brought about by the application of the School Placement Law.

Since the School Segregation Cases,[5] ten states have enacted school placement or pupil assignment laws in various forms.[6] No intellectually honest person would deny that those laws were passed in an effort to meet and solve problems presented by the School Segregation Cases. The Alabama Legislature did not await the decisions themselves, but took notice of the pendency of the cases in the Supreme Court of the United States and in Senate Joint Resolution No. 49, adopted September 21, 1953,[7] appointed an interim committee to prepare.

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[5] Brown v Board of Education, 1954, 347 U.S. 483; Bolling v Sharpe, 1954, 347 U.S. 497; Brown v Board of Education, 1955, 349 U.S. 294.

[6] Ala. Acts, 1955, No. 201 and 1957, No. 367, General Acts 1955, p. 492, General Acts 1957, p. 483 (Pocket Part, Alabama Code, 1940, Tit. 52, Secs. 61, et seq.); Ark. Stat. Ann. Secs. 80-1519 to -1525 (Supp. 1957); Fla. Stat. Ann. Sec. 230, 231 (Supp. 1956); La. Rev. Stat. Sec. 17; 81.1 (Supp. 1956); Miss. Code Ann. Secs. 6334-01 to -08 (Supp. 1956); N.C. Gen. Stat. Secs. 115-176 to -179 (Supp. 1955), asa amended, 1956 Extra Sess. Laws, 1 Race Rel. L. Rep. 939 (1956); S.C. Code Sec. 21-230, 21-247 to -247.7 (Supp. 1956); Tenn. Pub. Acts 1957, c. 13; Tex. Sess. Laws 1957, c. 287; Va. Code Ann. Secs. 22-232.1 to -232.16 (Add. Supp. 1956).

[7] General Acts of Alabama 1953, p. 1201.

> ". . . such legislation, including submission of Constitutional amendments, as may be required to protect the interest of the State and its citizens in the event of a decision by the Supreme Court of the United States which destroys or impairs the principle of separation of the races in the public schools of this State."

Following the decisions in the School Segregation Cases, the interim committee made its report to the regular session of the Alabama Legislature in 1955, Legislative Document No. 1, Regular Session, 1955. Its first proposal included the following:

> "1. Amend Section 256 of the Constitution so as to eliminate the express prohibition against the operation of mixed schools, attended by both races; but at the same time make clear that the State will not undertake to coerce anyone to attend mixed schools against his will, and will not be obligated to operate any such mixed schools at all. The amendment would also emphasize as the State's basic educational policy the fostering of education, but only to the extent of the available revenues of the State, and subject to the exercise of its police power to assure harmony and good order as the background for the education of Alabama children.
>
> * * * * *
>
> "It must be borne in mind that conditions and requirements may vary widely in different counties and school districts. The Legislature should have the greatest possible freedom to provide or authorize the School Boards to provide for the various sections in ways best suited to local conditions, after local authorities have exercised their screening powers to avoid impairment of educational function, social function and potential disorder inconsistent with the education of youth."

Section 256 of the Alabama Constitution of 1901 had provided in part: "Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race." The amendment eliminating that provision,* having been submitted by the

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* "Section 256. It is the policy of the State of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this constitution shall be construed as

Legislature was adopted by the people on August 28, 1956. After the adoption of that amendment, the 1955 School Placement Law, Acts 1955, p. 492, was amended to implement the amended Constitutional provisions by repealing various statutes which had required the maintenance of separate schools for the races. Acts 1957, p. 483.

With much force, the plaintiffs' counsel point to the Resolution of Interposition and Nullification passed by the Special Session of 1956 of the Alabama Legislature, effective February 2, 1956.[9] While the concluding sentence of the resolution terms it an "Act" it is in fact no more than a joint resolution and does not have the force and effect of law. See Alabama Constitution of 1901, Sec. 45; Re Doyle, 257 N. Y. 244, 177 N. E. 489, 87 A. L. E. 418; 49 Am. Jur. States etc., Sec. 36; 81 C. J. S. States, Sec. 40; 82 C. J. S. Statutes, Sec. 20. It amounted to no more than a protest, an escape valve through which the legislators blew off steam to relieve their tensions. Though defiant in spirit, the intent expressed by that resolution was confined to measures "constitutionally available to

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creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace or order.

"The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or muncipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the State for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state.

"To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide."

Code of Alabama 1957 Supplement, p. 19.

"HOUSE JOINT RESOLUTION

[9] "WHEREAS the Constitution of the United States was formed by the sanction of the several states, given by each in its sovereign capacity; and

"WHEREAS the states, being the parties to the constitutional compact, it follows of necessity that there can be no tribunal above their authority to decide, in the last resort, whether the compact made by them be violated; and, consequently, they must decide themselves, in

us." That resolution came before the adoption of the amendment which eliminated from the State constitution the requirement for segregated public schools. It cannot prevail over that amendment and over the subsequently amended and rewritten School Placement Law. The utmost benefit of the Interposition and Nullification Resolution to the plaintiffs' case is to color the construction of the School Placement Law by its spirit of intransigence. By itself alone, that Resolution is not enough to permit us to declare the School Placement Law unconstitutional.

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the last resort, such questions as may be of sufficient magnitude to require their interposition; and

"WHEREAS a question of contested power has arisen: The Supreme Court of the United States asserts, for its part, that the states did, in fact, in 1868, upon the adoption of the Fourteenth Amendment, prohibit unto themselves the power to maintain racially separate public institutions; the State of Alabama, for its part, asserts that it and its sister states have never surrendered such rights; and

"WHEREAS this assertion upon the part of the Supreme Court of the United States, accompanied by threats of coercion and compulsion against the sovereign states of this Union, constitutes a deliberate, palpable, and dangerous attempt by the court to prohibit to the states certain rights and powers never surrendered by them; and

"WHEREAS the question of contested power asserted in this resolution is not within the province of the court to determine, but that as in other cases in which one party to a compact asserts an infraction thereof, the judgment of all other equal parties to the compact must be sought to resolve the question; be it

RESOLVED **By The Legislature of Alabama, Both Houses Thereof Concurring:**

"That until the issue between the State of Alabama and the General Government is decided by the submission to the states, pursuant to Article V of the Constitution, of a suitable constituional amendment that would declare, in plain and unequivocal language, that the states do surrender their power to maintain public schools and other public facilities on a basis of separation as to race, the Legislature of Alabama declares the decisions and orders of the Supreme Court of the United States relating to separation of races in the public schools are, as a matter of right, null, void, and of no effect; and the Legislature of Alabama declares to all men as a matter of right, this State is not bound to abide thereby; we declare, further, our firm intention to take all appropriate measures honorably and constitutionally available to us, to avoid this illegal encroachment upon our rights, and to urge upon our sister states their prompt and deliberate efforts to check further encroachment by the General Government, through judicial legislation, upon the reserved powers of all states.

"That the Governor is requested to transmit a copy of this resolution to the executive authority of each of the other states, and to the Congress, and to the Supreme Court of the United States for its information.

"This resolution became an Act on February 2, 1956 without approval by the Governor."

Act. No. 42, Special Session 1956 of the Alabama Legislature, effective February 2, 1956.

The plaintiffs would have us conclude without further ado "that the whole intent is to continue the system of separate schools for Negro and white in the State of Alabama." In dealing with an Act of the legislature of a sovereign State, we cannot lightly reach such a conclusion, nor, indeed, are we permitted to do so except upon the most weighty and compelling of reasons.

In testing constitutionality "we cannot undertake a search for motive."[10] "If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into." Doyle v Continental Insurance Co., 94 U. S. 535, 541. As there is no one corporate mind of the legislature, there is in reality no single motive. Motives vary from one individual member of the legislature to another. Each member is required to "be bound by Oath or Affirmation to support the Constitution." Constitution of the United States, Article VI, Clause 3. Courts must presume that legislators respect and abide by their oths of office and that their motives are in support of the Constitution.

If, however, we could assume that the Act was passed by the legislature with an evil and unconstitutional intent, even that would not suffice. As executive officers of the State, the members of the defendant Board are likewise required to "be bound by Oath or Affirmation to support the Constitution." Constitution of the United States, Article VI, Clause 3. No court, without evidence, can possibly presume that the members of the defendant Board will violate their oaths of office.

It is possible for the Act to be applied so as to admit qualified Negro pupils to nonsegregated schools. Upon oral argument, counsel for both sides expressed their understanding that the North Carolina Pupil Enrollment Act was actually being so applied.[11] We cannot say, in advance of its applica-

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[10] Daniel v Family Ins. Co., 336 U.S. 221, 224, and cases there cited.

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[11] "JUDGE RIVES: I am under the impression, and I may be wrong. Is it or not a fact that in North Carolina under the replacement (sic) act, some (Negro) children have been placed in theretofore white schools?

"MR. JOHNSON: Yes, sir, there have been. I am free to say this to the court. Judge Parker himself told me two days before he died that that was the case. I discussed this with him and he said that there had been one or two cases, several cases around in which arrangements had

tion, that the Alabama Law will not be properly and constitutionally administ

The burden assumed by the plaintiffs is not simply to show that some one or more sections or parts of the Alabama School Placement Law are unconstitutional, but that said law is utterly void in toto. That is true because the plaintiffs are not in position to show upon what particular ground they were not permitted to attend the schools of their choice.

The plaintiffs urge that Sections 2, 3, 4, 5, 7 and 8 of the Act are patently unconstitutional. Section 4 sets forth the factors which the Board should consider in determining transfer or continuance of the pupils in the public schools. Plaintiffs do not attack each and all of those factors. Instead, their briefs states:

> "Admittedly, some of these factors may be germaine to education and to an enlightened educational system. However, a number are not and have relevancy only in connection with race:
>
> ' "In the assignment, transfer or continuance of pupils among and within the schools or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil as well as other relevant matters; available room and teaching capacity in the various schools; the availability of transportation; the effect of the adminission of new pupils upon established or proposed academic programs; the suitability of established curricula for the particular pupil; the adequacy of the pupil's academic preparation for ad-

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been made and were acceptable and there had been admissions of some colored people to the schools of North Carolina and this is as good a place as any to say to this court that that is perfectly possible under the laws of Alabama as they are now written. The laws of Alabama were written for the purpose of eliminating from it and from the Constitution the absolute legal prohibition against the operation of integrated schools."

* * * * *

"MR. WASHINGTON: * * * I might mention this offhand, one Negro child was placed in a school designated as a white school in Alabama but he was removed three weeks hence because of community pressure and ill will generated by the pressure.

"JUDGE RIVES: What is your understanding of the North Carolina situation?

"MR. WASHINGTON: That it is proceeding in some regions with great rapidity, around the Greenville area and some other areas."

mission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; *the psychological qualification of the pupil for the type of teaching and association involved;* the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards in a particular school; *the physical effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill-will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers;* the choice and interest of the pupil, the moral conduct; health and personal standards of the pupil; the request or consent of parents or guardian and the reasons assigned therefor."

The tests underscored are the ones to which the plaintiffs particularly object. Some of the others they conceded upon oral argument, as in good faith they must, to be proper and even desirable.[12]

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[12] "MR. JACKSON: Your Honor, we say some of these particular requirments, that they are logical, because it would amount to a better public school system in Birmingham. For instance, we point out, number one, available room and teaching capacity in the various schools. In the Brown case this was considered to be a legitimate reason for consideration in determining whether the child should be admitted.

* * * * *

"Number two, the availability of transportation facilities. That is conceded to be a proper consideration on the part of the Board.

* * * * *

"MR. JACKSON: The adequacy of the pupils' academic preparation for admission to a particular school and curriculum. That would be a proper consideration.

* * * * *

"MR. JACKSON: The choice and interests of the pupil. We believe that choice is important. We don't differ with that. We think a child should have a right to make a choice. That is democratic and in accordance with our system of government.

* * * * *

"MR. JACKSON: The request or consent of parents or guardian and the reasons assigned therefor. I think that is reasonable."

The Act contains a severability provision.[13] In Alabama, Court of Alabama has the last say on the construction of the Act. In advance of such authoritative construction, no federal court can assume that the admittedly proper tests for admission to any public school may not remain the law even though every allegedly improper test and part of the Act may fall for want of constitutionality.

Upon the present record there is no showing but that the exclusion of the plaintiffs from the schools of their choice may be based upon one or more of the admittedly proper tests. For example, no proof was offered as to the available room, the teaching capacity, or the availability of transportation facilities in the schools of plaintiffs' choice. Such proof being totally absent, no court can assume that the plaintiffs can be admitted to the schools of their choice without overtaxing already crowded rooms, classes or school busses.

In the state of this record, we cannot pass separately upon the particular tests and parts of the Act to which the plaintiffs object, for as said in the case of Spector Motor Co. v McLaughlin, 1944, 323 U. S. 101, 105:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality * * * unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more interwined with preliminary doubts about local law, we have insisted that federal courts do not decide

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"MR. WASHINGTON: * * * It has been admitted that there are certain portions or provisions of article 4, section 4, that are very good. Certainly they are in line with a sound educational policy. I agree with learned counsel when he said that someone walked up and said, "We ought to have had this long ago.' Certainly we ought to have had this long ago. But section 4 is designed to perpetuate segregation."

[13] "Section 14. The provisions of this Act are severable, and if any section or provision of this Act shall be held to be in violation of the Constitution of Alabama or of the United States, such decision shall not affect the validity or enforceability of the remainder of this Act." Act No. 367, Alabama Legislature Regular Session 1957.

such a provision is given full scope and effect.[14] The Supreme

[14] Alabama State Federation of Labor v McAdory, 18 So. 2nd 810; Opinions of Justices, 23 So. 2nd 505; Newton v City of Tuscaloosa, 36, So. 2nd. 487.

> questions of constitutionality on the basis of preliminary guesses regarding local law. * * * Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored cannon of constitutional adjudication."

The grounds upon which the Louisiana and Virginia Acts were declared unconstitutional on their face have been heretofore stated at some length. See ante pages 6, 7 and 8. Enough has also been said to show that none of those grounds are applicable to the Alabama Act. The legal situation in Alabama is more analogous to that in North Carolina, where the Pupil Enrollment Act was ruled to be not unconstitutional on its face in an opinion by the late great Chief Judge Parker, from which we quote:

> "Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in Brown v Board of Education, 349 U.S. 294, 299, 75 S.Ct. 753, 756, 99 L.Ed. 1083:
>
> School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.' "

Carson v Warlick, 4th Cir. 1956, 238 F. 2d 724, 728.

All that has been said in this present opinion must be limited to the constitutionality of the law *upon its face*. The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered. If not, in some future proceeding it is possible that it may be declared un-

constitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the State.

The Clerk will enter judgment in favor of the defendant that all relief to the plaintiffs be denied.

This 9th day of May, 1958.

/s/ RICHARD T. RIVES
United States Circuit Judge

/s/ SEYBOURN A. LYNNE
United States District Judge

/s/ H. H. GROOMS
United States District Judge

APPENDIX B

Each Probate Judge, Sheriff, and the Clerk and Register of the Circuit Court is required by law to preserve this slip or pamphlet in a book kept in his office until the Act is published in permanent form.

ALABAMA LAW

(Regular Session, 1955)

Act. No. 201 H. 296—Richardson, Martin, Ramey

AN ACT

To declare the public policy of the State of Alabama with respect to public education; to provide for further study and analysis as a basis for general reconsideration of the efficiency of the system in promoting the progress of pupils in accordance with their apitudes and in furtherance of social order and good will; pending such reconsideration to authorize city and county Boards of Education to provide for the continuation or establishment of units, facilities and curricula and the placement of pupils therein so as to assure the best practical educational curriculum and environment for the individual pupils consistent with the educational progress of others and the paramount function of the State's police power to assure social order, good will and the public welfare; to establish the right of parents or guardians to withdraw children from public schools under certain conditions; to provide for appeals from the decisions of such Boards of Education in certain cases; to repeal Sections 56, 93, 163, 167, 318 and 319 of Title 52 of the Code of Alabama of 1940.

Be It Enacted by the Legislature of Alabama:

Section 1. The Legislature finds and declares that the rapidly increasing demands upon the public economy for the continuance of education as a public function and the efficient maintenance and public support of the public school system require, among other things, consideration of a more flexibile and selective procedure for the establishments of units, facilities and curricula and as to the qualification and assignment of pupils.

The legislature also recognizes the necessity for a procedure for the analysis of the qualifications, motivations, aptitudes and characteristics of the individual pupils for the purpose of placement, both as a function of efficiency in the educational process and to assure the maintenance of order and good

will indispensable to the willingness of its citizens and taxpayers to continue an educational system as a public function, and also as a vital function of the sovereignty and police power of the State.

Section 2. To the ends aforesaid, the State Board of Education shall make continuing studies as a basis for general reconsideration of the efficiency of the educational system in promoting the progress of pupils in accordance with their capacity and to adapt the curriculum to such capacity and otherwise conform the system of public education to social order and good will. Pending further studies and recommendations by the school authorities the legislature considers that any general or arbitrary reallocation of pupils heretofore entered in the public school system according to any rigid rule of proximity of residence or in accordance solely with request on behalf of the pupil would be disruptive to orderly administration, tend to invite or induce disorganization and impose an excessive burden on the available resources and teaching and administrative personnel of the schools.

Section 3. Pending further studies and legislation to give effect to the policy declared by this Act, the respective city and county Boards of Education, hereinafter referred to as "local Boards of Education," are not required to make any general reallocation of pupils heretofore entered in the public school system and shall have no authority to make or administer any general or blanket order to that end from any source whatever, or to give effect to any order which shall purport to or in effect require transfer or initial or subsequent placement of any invidual or group in any unit or facility without a finding by the local Board or authority designated by it that such transfer or placement is as to each individual pupil consistent with the test of the public and educational policy governing the admission and placement of pupils in the public school system prescribed by this Act.

Section 4. Subject to appeal in the limited respect herein provided, each local Board of Education shall have full and final authority and responsibility for the assignment, transfer and continuance of all pupils among and within the public schools within its jurisdiction, and may prescribe rules and regulations pertaining to those functions. Subject to review

by the Board as provided herein, the Board may exercise this responsibility directly or may delegate its authority to the Superintendent of Education or other person or persons employed by the Board. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

Local Boards of Education may require the assignment of pupils to any or all schools within their jurisdiction on the basis of sex, but assignments of pupils of the same sex among schools reserved for that sex shall be made in the light of the other factors herein set forth.

Section 5. Local Boards of Education may, by mutual agreement, provide for the admission to any school of pupils residing in adjoining districts whether in the same or different counties, and for transfer of school funds or other pay-

ments by one Board to another for or on account of such attendance.

Section 6. Subject to the provisions of law governing the tenure of teachers, local Boards of Education shall have authority to assign and re-assign or transfer all teachers in schools within their jurisdiction.

Section 7. A parent or guardian of a pupil may file in writing with the local Board objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated by the Board. Unless a hearing is requested, the Board shall act upon the same within 30 days, stating its conclusion. If a hearing is requested the same shall be held beginning within 30 days from receipt by the Board of the objection or petition, at a time and place within the school district designated by the Board.

The Board may itself conduct such hearing or may designate not less than three of its members to conduct the same and may provide that the decision of the members designated or a majority thereof shall be final on behalf of the Board.

In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the Board shall be authorized to conduct investigations as to any objection or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of such investigations and examinations.

Section 8. Any other provisions of law notwithstanding, no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the Board of Education. If in connection therewith a requested assignment or transfer is refused by the Board, the parent or guardian may notify the Board in writing that he is unwilling for the pupil to remain in the school to which assigned, and the assignment and further attendance of the pupil shall thereupon terminate; and such child shall be entitled to such aid for education as may be authorized by law.

Section 9. The action of the Board shall be final except that

in the event that the pupil or the parent or guardian, if any, of any minor or, if none, of the custodian of any such minor shall, as next friend, file exception before such Board to the final action of the Board as constituting a denial of any right of such minor guaranteed under the Constitution of the United States, and the Board shall not, within fifteen days reconsider its final action, an appeal may be taken from the final action of the Board, on that ground alone, to the Circuit Court in Equity of the Judicial Circuit in which the School Board is located, by filing with the Register within thirty days from the date of the Board's final decision a petition stating the facts relevant to such pupil as bearing on the alleged denial of his rights under the Constitution, accompanied by bond with sureties approved by the Register, conditioned to pay all costs of appeal if the same shall not be sustained.

On such appeal the Circuit Court may, as in other equity cases, summons a jury for the determination of any issue or issues of fact presented. Appeal to the Supreme Court of Alabama may be taken from the decision of the Circuit Court in the same manner as appeals may be taken in other suits in equity, either by the appellant or by such Board of Education.

Section 10. Sections 56, 93, 163, 167, 318 and 319 of Title 52 of the Code of Alabama of 1940 are hereby repealed.

Section 11. The provisions of this Act are severable, and if any section or provision of this Act shall be held to be in violation of the Constitution of Alabama or of the United States, such decision shall not affect the validity or enforceability of the remainder of this Act.

Section 12. This Act shall take effect immediately upon its passage and approval by the Governor, or upon its otherwise becoming law.

This bill became an act on August 3, 1955 without approval by the Governor.

I hereby certify that the foregoing copy of an Act of the Legislature of Alabama has been compared with the enrolled Act and it is a true and correct copy thereof.

Given under my hand this 3rd day of August, 1955.

R. T. GOODWYN, JR.

Clerk of the House

START APPENDIX C

Each Probate Judge, Sheriff, and the Clerk and Register of the Circuit Court is required by law to preserve this slip or pamphlet in a book kept in his office until the Act is published in permanent form.

ALABAMA LAW

(Regular Session, 1957)

Act. No. 367 S. 395—Davis (Lowndes), Allen, Leonard, Engelhardt, Boutwell, Givhan, Lamberth, Eddins, Cooper, Little, Smith, Yarbrough (Randolph), Cantrell, Bradford, Jones, Van Antwerp, Hall, Robison, Skidmore, Newton, Reeves, Tate, Dyar, James, Goodwin, Grisham, Davis (Pickens), Vann, Moses, Metcalf, Flowers, Shelton, Roberts, Calvin and Yarbrough (Autauga).

AN ACT

To amend Act No. 201, Regular Session 1955, with respect to the assignment and placement of pupils in the public schools; to establish and regulate the procedure for hearings by boards of education with respect to the operation of public schools; to authorize the Attorney General to render advice and assistance to local boards of education; to provide that boards of education shall exercise judicial functions with respect to hearings upon the assignment of pupils; to limit the liability of school boards, officials and employees in the exercise of their official responsibilities; to reenact Act No. 201, Regular Session 1955, in all respects except as amended hereby.

Be It Enacted by the Legislature of Alabama:

That Act No. 201 of the Legislature of Alabama, Regular Session 1955, which became law on August 2, 1955 pursuant to Section 125 of the constitution, be and the same is hereby amended to read as follows:

Section 1. The legislature finds and declares that the rapidly increasing demands upon the public economy for the continuance of education as a public function and the efficient maintenance and public support of the public school system require, among other things, consideration of a more flexible

and selective procedure for the establishments of units, facilities and curricula and as to the qualification and assignment of pupils.

The legislature also recognizes the necessity for a procedure for the analysis of the qualifications, motivations, aptitudes and characteristics of the individual pupils for the purpose of placement, both as a function of efficiency in the educational process and to assure the maintenance of order and good will indispensable to the willingness of its citizens and taxpayers to continue an educational system as a public function, and also as a vital function of the sovereignty and police power of the State.

Section 2. To the ends aforesaid, the State Board of Education shall make continuing studies as a basis for general reconsideration of the efficiency of the educational system in promoting the progress of pupils in accordance with their capacity and to adapt the curriculum to such capacity and otherwise conform the system of public education to social order and good will. Pending further studies and recommendations by the school authorities the legislature considers that any general or arbitrary reallocation of pupils heretofore entered in the public school system according to any rigid rule of proximity of residence or in accordance solely with request on behalf of the pupil would be disruptive to orderly administration, tend to invite or induce disorganization and impose an excessive burden on the available resources and teaching and administrative personnel of the schools.

Section 3. Pending further studies and legislation to give effect to the policy declared by this Act, the respective city and county Boards of Education, hereinafter referred to as "local Boards of Education," are not required to make any general reallocation of pupils heretofore entered in the public school system and shall have no authority to make or administer any general or blanket order to that end from any source whatever, or to give effect to any order which shall purport to or in effect require transfer or initial or subsequent placement of any individual or group in any unit or facility without a finding by the local Board or authority designated by it that such transfer or placement is as to each individual pupil consistent with the test of the public and educational policy gov-

erning the admission and placement of pupils in the public school system prescribed by this Act.

Section 4. Subject to appeal in the limited respect herein provided, each local Board of Education shall have full and final authority and responsibility for the assignment, transfer and continuance of all pupils among and with the public schools within its jurisdiction, and may prescribe rules and regulations pertaining to those functions. Subject to review by the Board as provided herein, the Board may exercise this responsibility directly or may delegate its authority to the Superintendent of Education or other person or persons employed by the Board. In the assignment, transfer or continuance of pupils among and within the schools, or within the classroom and other facilities thereof, the following factors and the effect or results thereof shall be considered, with respect to the individual pupil, as well as other relevant matters: Available room and teaching capacity in the various schools; the availability of transportation facilities; the effect of the admission of new pupils upon established or proposed academic programs; the suitability of established curricula for particular pupils; the adequacy of the pupil's academic preparation for admission to a particular school and curriculum; the scholastic aptitude and relative intelligence or mental energy or ability of the pupil; the psychological qualification of the pupil for the type of teaching and associations involved; the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof; the effect of admission upon prevailing academic standards at a particular school; the psychological effect upon the pupil of attendance at a particular school; the possibility or threat of friction or disorder among pupils or others; the possibility of breaches of the peace or ill will or economic retaliation within the community; the home environment of the pupil; the maintenance or severance of established social and psychological relationships with other pupils and with teachers; the choice and interests of the pupil; the morals, conduct, health and personal standards of the pupil; the request or consent of parents or guardians and the reasons assigned therefor.

Local Boards of Education may require the assignment of pupils to any or all schools within their jurisdiction on the

basis of sex, but assignments of pupils of the same sex among schools reserved for that sex shall be made in the light of the other factors herein set forth.

Section 5. Local Board of Education may, by mutual agreement, provide for the admission to any school of pupils residing in adjoining districts whether in the same or different counties, and for transfer of school funds or other payments by one Board to another for or on account of such attendance.

Section 6. Subject to the provisions of law governing the tenure of teachers, local Boards of Education shall have authority to assign and re-assign or transfer all teachers in schools within their jurisdiction.

Section 7. A parent or guardian of a pupil may file in writing with the local Board objections to the assignment of the pupil to a particular school, or may request by petition in writing assignment or transfer to a designated school or to another school to be designated by the Board. Unless a hearing is requested, the Board shall act upon the same within 30 days, stating its conclusion. If a hearing is requested the same shall be held beginning within 30 days from receipt by the Board of the objection or petition at a time and place within the school district designated by the Board.

The Board may itself conduct such hearing or may designate not less than three of its members to conduct the same and may provide that the decision of the members designated or a majority thereof shall be final on behalf of the Board. The Board of Education is authorized to designate one or more of its members or one or more competent examiners to conduct any such hearings, and to make testimony, and to make a report of the hearings to the entire board for its determination. No final order shall be entered in such case until each member of the board of education has personally considered the entire record.

In addition to hearing such evidence relevant to the individual pupil as may be presented on behalf of the petitioner, the Board shall be authorized to conduct investigations as to any objection or request, including examination of the pupil or pupils involved, and may employ such agents and others, professional and otherwise, as it may deem necessary for the purpose of such investigations and examinations.

For the purpose of conducting hearings or investigations hereunder, the Board shall have the power to administer oaths and affirmations and the power to issue subpoenas in the name of the State of Alabama to compel the attendance of witnesses and the production of documentary evidence. All such subpoenas shall be served by the sheriff or any deputy of the county to which the same is directed; and such sheriff or deputy shall be entitled to the same fees for serving such subpoenas as are allowed for the service of subpoenas from a circuit court. In the event any person fails or refuses to obey a subpoena issued hereunder, any circuit court of this State within the jurisdiction of which the hearing is held or within the jurisdiction of which said person is found or resides, upon application by the board or its representatives, shall have the power to compel such person to appear before the board and to give testimony or produce evidence as ordered; and any failure to obey such an order of the court may be punished by the court issuing the same as a contempt thereof. Witnesses at hearings conducted under this Act shall be entitled to the same fees as provided by law for witnesses in the circuit courts, which fees shall be paid as a part of the costs of the proceeding.

Section 8. Any other provisions of law notwithstanding, no child shall be compelled to attend any school in which the races are commingled when a written objection of the parent or guardian has been filed with the Board of Education. If in connection therewith a request assignment or transfer is refused by the Board, the parent or guardian may notify the Board in writing that he is unwilling for the pupil, to remain in the school to which assigned, and the assignment and further attendance of the pupil thereupon terminate; and such child shall be entitled to such aid for education as may be authorized by law.

Section 9. The findings of fact and action of the Board shall be final except that in the event that the pupil or the parent or guardian, if any, of any minor or, if none, of the custodian of any such minor shall, as next friend, file exception before such Board to the final action of the Board as constituting a denial of any right of such minor guaranteed under the Constitution of the United States, or any right under the

laws of Alabama, and the Board shall not, within fifteen days reconsider its final action, an appeal may be taken from the final action of the Board, on such ground alone, to the Circuit Court in Equity of the Judicial Circuit in which the school board is located, by filing with the Register within thirty (30) days from the date of the Board's final decision a petition stating the facts relevant to such pupil as bearing on the alleged denial of his rights under the Federal Constitution, or state law, accompanied by bond with sureties approved by the Register, conditioned to pay all costs of appeal if the same shall not be sustained. A copy of such petition and bond shall be filed with the President of the Board. The filing of such a petition for appeal shall not suspend or supersede an order of the board of education; nor shall the court have any power or jurisdiction to suspend or supersede an order of the board issued under this Act before the entry of a final decree in the decree in the proceeding, except that the court may suspend such an order upon application by the petitioner made at the time of the filing of the petition for appeal, after a preliminary hearing, and upon a prima facie showing by the petitioner that the board has acted unlawfully to the manifest detriment of the child who is the subject of the proceeding.

On such appeal the Circuit Court may, as in other equity cases, summon a jury for the determination of any issue or issues of fact presented. Appeal to the Supreme Court of Alabama may be taken from the decision of the Circuit Court in the same manner as appeals may be taken in other suits in equity, either by the appellant or by such Board of Education.

Section 10. The Board before whom any objection or proceeding with respect to the placement of pupils is pending may, upon authorization in writing of a majority of the Board, request the Attorney General of Alabama to appear in such proceedings as amicus curiae to assist the Board in the performance of its judicial functions and to represent the public interest. Expenses of court reporters, subpoenas, witness fees and other costs of such proceedings approved by the Board shall be the obligation of the city or county involved, and shall be paid from the public school funds of such city or county.

Section 11. Sections 56, 93, 163, 167, 318 and 319 of Title

52 of the Code of Alabama of 1940 are hereby repealed.

Section 12. Since the determination of the matters required to be considered by boards of education pursuant to the provisions of Section 4 hereof involve determinations and inquiries of a judicial character of the most fundamental importance in the administration of justice and the maintenance of peace and order within the State of Alabama, all local boards of education are hereby constituted judicial tribunals, and the members thereof judicial officers within the meaning and intent of Articles VI of the Constitution of Alabama. Said local boards of education are hereby invested with powers of a judicial nature to the extent required for the proper performance of the responsibilities entrusted to them by this Act, and the exercise of said powers shall be subject to the provisions of said Article of the constitution and clothed with the immunities of all other judicial tribunals and officials of the state.

Section 13. No board of education or member thereof, nor its agents or examiners, shall be answerable to any charge of libel, slander, or other action, whether civil or criminal, by reason of any finding or statement contained in the written findings of fact or decisions or by reason of any written or oral statements made in the course of proceedings or deliberations provided for under this Act.

Section 14. The provisions of this Act are severable, and if any section or provision of this Act shall be held to be in violation of the Constitution of Alabama or of the United States, such decision shall not affect the validity or enforceability of the remainder of this Act.

Section 15. This Act shall take effect immediately upon its passage and approval by the Governor, or upon its otherwise becoming law.

This bill became an act on Augst 26, 1957 without approval by the Governor.

I hereby certify that the foregoing copy of an Act of the Legislature of Alabama has been compared with the enrolled Act and it is a true and correct copy thereof.

Given under my hand this 27 day of August, 1957.

J. E. SPEIGHT
Secretary of Senate.

APPENDIX D

Each Probate Judge, Sheriff, and the Clerk and Register of the Circuit Court is required by law to preserve this slip or pamphlet in a book kept in his office until the Act is published in permanent form.

ALABAMA LAW

(Regular Session, 1957)

Act No. 528 S. 396—Bradford, Yarbrough (Autauga), Newton, Englehardt, Calvin, Jones, Vann, Yarbrough (Randolph), Van Antwerp, Cantrell, James, Little, Smith, Goodwin, Leonard, Davis (Lowndes), Hall, Robison, Grisham, Flowers, Allen, Boutwell, Skidmore, Reeves, Roberts, Tate, Givhan, Cooper, Eddins, Lamberth, Dyar, Davis (Pickens), Moses, Shelton, and Metcalf

AN ACT

To preserve domestic tranquility, and good order and efficiency in public educational institutions, and to avoid disorder and potential violence within the State by providing for the closing of public schools under certain conditions; to provide assistance for certain children for whom proper public school facilities are not available, and to provide for the transfer or reassignment of teachers and other employees of closed public schools.

Be It Enacted by the Legislature of Alabama:

Section 1. Each board of education shall discontinue the operation of any school within its jurisdiction, indefinitely or for such term as it may determine, if the board finds, in the manner herein provided, that the continued operation of such school will be accompanied by such tensions, friction or potential disorder or ill will within the school as substantially to impair effective standards or objectives of education of its pupils, or by potential impairment of peace, order and good will in the community, school district, or county involved.

Section 2. The determination to discontinue the operation of any public school on any ground provided in Section 1 shall

be made by the board of education having jurisdiction thereof only after public hearings, held at a time and place fixed by the board, which may be invoked by the board at any time upon the vote of a majority of its members, or upon petition filed with the board signed by not less than 100 qualified voters of the school district, or upon petition filed by the parents, or one of them, or guardians of a majority of the pupils enrolled in the school proposed to be discontinued. The board shall give notice of such hearing by publication in a newspaper of general circulation in the district not less than one week in advance of the hearing, and must hold a hearing within thirty days of the receipt of any such petition, but may adjourn the hearing from time to time pending reasonable effort or procedure to relieve the cause for discontinuance.

Section 3. A determination to close a public school made in accordance with the procedure hereto prescribed or to reopen the school upon termination of the cause for discontinuance shall be final and not subject to review by any court or other authority.

Section 4. The board of education may maintain any school which has been closed as herein provided, in a reserve or standby condition, or it may sell or lease such school, upon such terms and conditions as the board shall determine, provided, that prior consideration shall be given to the sale or lease of such school for private nonprofit educational purposes.

Section 5. If as a result of the closing of a school or schools or otherwise there are children of school age residing within a district for whom no public school is available, who are otherwise qualified for education in public schools, and have not, independently of the ground for discontinuance, elected to attend private schools, the board of education may, in lieu of providing a public school or schools for such children, pay to their parents or guardians, or to a private educational institution designated by the parents or guardians, in equal amounts for each such child, such sums from available school or education funds as the board shall determine to be reasonably necessary to enable such children to attend private nondenominational schools selected by their parents or guardians. If any public schools are operated by the board during the term for which any such payments are made, such payments shall not exceed the total amount per pupil allocated or bud-

geted by the board for the district as a whole for the current term.

Section 6. In the event that any board of education shall determine that a condition is threatened which will or might require the discontinuance of a school as herein provided, the board may in its discretion, by agreement with the parents or guardians of any enrolled pupils or applicants for enrollment whose enrollment would contribute to such a condition requiring discontinuance, provide for payments for such pupils or applicants for the purposes and in the amounts provided in Section 5 hereof, in lieu of placement of such pupils or applicants in a public school. For the purposes of allocating the minimum program fund, or other State contributions to local boards of education, the daily attendance of pupils attending private non-denominational schools in districts where public schools are not available for the reasons herein stated shall be counted together with the pupils in the public schools of such district.

Section 7. In the event that a school is closed as herein provided, the board may transfer the teachers and other employees of the closed school to other schools within the jurisdiction of the employing board of education at the same compensation, upon the same terms and with the same rights and benefits to which they are entitled at the closed school.

Section 8. The provisions of this Act are severable, and if any section or provision hereof is held invalid, the remainder shall not be affected thereby.

Section 9. All laws or parts of laws which conflict with this Act are repealed.

Section 10. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

This bill became an act on September 16, 1957 without approval by the Governor.

I hereby certify that the foregoing copy of an Act of the Legislature of Alabama has been compared with the enrolled Act and it is a true and correct copy thereof.

Given under my hand this 16 day of September, 1957.

J. E. SPEIGHT,
Secretary of Senate.

APPENDIX E

Each Probate Judge, Sheriff, and the Clerk and Register of the Circuit Court is required by law to preserve this slip or pamphlet in a book kept in his office until the Act is published in permanent form.

ALABAMA LAW
(Regular Session, 1953)

Act No. 894 S. J. R. 49—Bonner

SENATE JOINT RESOLUTION

BE IT RESOLVED by the Senate of Alabama, the House of Representatives concurring, that:

WHEREAS, there are pending before the Supreme Court of the United States, a deliberately planned group of cases in which the present Court is asked to reverse its traditional position and hold that the segregation of white and negro children into separate but equal schools has now become violative of the Constitution of the United States, and

WHEREAS, the approval of that position and its logical extension as a revolutionary precedent:

a. Would disorganize the operation of the public school system in Alabama, throw into confusion both the training and assignments of teachers and force the reallocation of all pupils.

b. Would impose expense upon the State in the continuation of the school system beyond any present provision or capacity to meet and compel serious consideration of the abandonment of the function of public education.

c. Would, in its necessary application and extension sterilize the police power of the State, reflected in many statutes, which has promoted and is essential to the preservation of domestic tranquility.

THEREFORE, it is found, determined and declared by the Legislature of Alabama:

1. The social structure of this State, with a large African negro population substantially preserved under laws and customs binding upon both races against inter-marriage and miscegenation, has from the beginning been built upon the universally recognized and accepted principle of separation of the races. The policy of social segregation carries no implied or necessary imputation of inferiority, since, so far as the

State is concerned, it is applicable to whites and negroes alike, without hypothesis except social harmony. The general acceptance of segregation as reflected in present laws as promotive of social order and harmony is an inseparable and inherent basis of the social organization of this State, at every level, State, County and City. The policy of basic segregation is universally regarded as the foundation of or collaterally essential to the laws prohibiting intermarriage and miscegenation.

2. All major institutions and organizations in this State both public and private have been established and developed in the light of provisions of the Fourteenth Amendment and in reliance upon the interpretations placed upon it without substantial dissent since its adopted, by Congress, by the Supreme Court, and by the States.

3. The educational policies and institutions of Alabama have especially been molded by the principle of separation. No serious consideration has ever been given to the possibility of interracial schools. At the present time and for the foreseeable future, the social and personal habits, tastes and aptitudes of both adults and children of the white and colored residents of the State are so wholly different as to preclude any possibility of an abrupt amalgamation in the schools without the most serious and far reaching consequences. The fiscal, legislative and organizational difficulties engendered by a reversal by the Court of the long accepted principle of the constitutional validity of separation would be so great as to preclude any possibility of solution within a generation in time. The employment, seniority and tenure of teachers, the location and design of schools, the number and routing of school busses, the content and arrangement of the curriculum in every school, the standards of instructions, and practically every other aspect of the educational system of the State are based upon the present separation and would have to be drastically revised if the principle of separation should be invalidated. The changes which would be required would impose a financial burden far beyond the present tax resources of the State. These heavy expenses could not be met without both additional legislation and one or more amendments to the Constitution of Alabama, neither of which would be obtainable in the foreseeable future.

4. In addition to the insuperable fiscal, organizational, and legislative burdens and complications which an adverse decision would bring about, the social and political impact of an attempted judicial abolition of the fundamental and primary principle of this State's organization would be so revolutionary as to endanger the peace and order of every section of the State. The proposed nullification of the police policy of the State as to non-discriminatory segregation and related statutes not only invites, indeed it assures disorder. It would also convince the vast majority of the citiens of Alabama that the Supreme Court was acting politically and not judicially, since it has universally been assumed that measures adopted contemporaneously with the consideration and adoption of the Fourteenth Amendment, concurrently with the drastic and radical reconstruction legislation, and accepted for more than eighty-five years has been and remains valid until changed by proper political action.

NOW, THEREFORE, in order to defend and protect the financial stability, and the peace and welfare of Alabama and its citiens of every race, it is requested and directed:

FIRST: That the Attorney General prepare or cause to be prepared and filed in his name, on behalf of the State of Alabama, a brief as amicus curiae in one or more of the cases now pending in the Supreme Court of the United States involving the question of the constitutional validity of the separation of races in the public school systems of the States, asserting in such brief the position that such separation is valid and within the power of the State to require, and pointing out to the Court the extremely ominous and disturbing consequences in this State of a contrary decision.

SECOND: That the Governor call a special and emergency session of this Legislature immediately upon the announcement of any decision by the Supreme Court of the United States which threatens, either directly or by implication, the continuing validity of the present organiation of the schools of this State.

THIRD: That the President of the Senate and the Speaker of the House appoint a committee of three members from each body to prepare, after consultation with the Governor, the Superintendent of Education and such other persons as it may

determine, such legislation, including submission of Constitutional amendments, as may be required to protect the interests of the State and its citizens in the event of a decision by the Supreme Court of the United States which destroys or impairs the principle of separation of the races in the pulblic schools of this State.

Approved September 21, 1953.

Time: 2:00 P.M.

I hereby certify that the foregoing copy of an Act of the Legislature of Alabama has been compared with the enrolled Act and it is a true and correct copy thereof.

Given under my hand this 24 day of September, 1953.

J. E. SPEIGHT,

Secretary of Senate.

APPENDIX F

In the Legislature of the State of

ALABAMA

REGULAR SESSION, 1955

Senate

Legislative Document No. 1

Report of Alabama
Interim Legislative Committee
on
SEGREGATION IN THE
PUBLIC SCHOOLS

REPORT OF
ALABAMA INTERIM LEGISLATIVE COMMITTEE
ON
SEGREGATION IN THE PUBLIC SCHOOLS

The Committee appointed pursuant to Senate Joint Resolution 49, approved September 21, 1953, tenders the following report to the legislature of Alabama with respect to the problem of racial segregation in the public schools.

INTRODUCTION

The Committee believes that the problem which the State of Alabama must meet as a result of the recent Supreme Court decision on segregation is the most important and far reaching issue which has confronted the people of the State since Reconstruction. The Committee has approached the study of this problem with humility, knowing that the final answer lies not with the Committee but with the legislature and the people of this State.

The Committee's study has led it to the firm conclusion that the people of our state are determined to have:—

(1) Education for all children of the state, and

(2) No compulsory mixing of races in our schools.

Under the present Constitution and statutes of Alabama these two basic policies are incompatible as a result of the recent Supreme Court decision. As pressures mount from ill-advised influences both within and without our state our school system and our school officials are both in danger. The recent outbreaks of violence in border states and communi-

ties are pale reflections of the result of a forced integration in this state, and if we are to save our schools and our children from violence, disorder and tension it is imperative that prompt action be taken.

After appointment, the members of the Committee met from time to time to study the problems involved. The Committee and its members conferred with many interested citizens, and particularly with educators. In May, 1954 the Supreme Court announced its decision and in early July, 1954 the Committee consulted with Governor Gordon Persons, and presented to him the proposed amendments to the Constitution which are now submitted formally in this report.

The Committee has considered numerous suggested solutions of the problems which confront us. Some of these give considerable promise of success and workability. But there are as many different situations to be met as there are communities in the State, and the Commitee feels that no one solution is the complete answer but that several solutions and combinations of solutions will be necessary.

Therefore, the Committee's recommendations are that constitutional amendments be adopted to accomplish the following general purposes:

1. Give the legislature flexibility and freedom of action in dealing with the problem.
2. Give school officials protection by making them judicial officiers and furnishing them with legal counsel from the Attorney General's office.

The Committee's recommendations do not call for abolition or abandonment of the public school system. Its proposals are not as drastic as those adopted or proposed in some neighboring states. The recommendations would give the legislature power—to use itself or to delegate to local authorities—with which to cope with any problems that may rise. In doing this, the tenure and retirement systems which protect our teachers can be fully preserved.

The Committee feels that under the present legal situation some school systems in the State may at any time be faced with an intolerable situation. It, therefore, believes that prompt action is desirable to protect our school officials and to give the elected representatives of the people the power to

modify our system of education so as to meet the threat of compulsory racial integration.

1. General Comments

The Committee's recommendations as to the necessity for providing greater constitutional flexibility for future legislative action in the field of education are based upon the unanimous concurrence of the members of the Committee in these fundamental considerations.

The overwhelming majority of white citizens of Alabama are unalterably opposed to the idea of permitting the use of the public school system to coerce racial integration. The Committee believes that the vast majority of Negro citizens of the State are instinctively and genuinely opposed to the idea of compulsory integration and its effect upon the basic harmony between the white and negro people of Alabama.

There is in Alabama a basic sympathy and understanding between the races which is genuine and sincere. There is no dormant attitude of hostility between them. Coerced integration, making use of the children and of the vital function of the schools, would not only generate but would perpetuate hostility and resentment between the races with shocking consequences.

Although the entire social order would suffer, the negro people would be by far the greater sufferers from the tension which would result from any attempt to compel integration. One of the unfortunate results would be the certainty of decisive economic disadvantage to the negro. Resentment of the use of the schools and the children to force integration would react against the negro in many ways. White employers would be strongly induced to withhold employment from negro parents who would take advantage of the intended compulsion, leases would likewise be terminated, and trade and commercial relations, now in satisfactory progress, would be affected.

In the course of the certain and justified resentment and friction arising out of the attempt at social compulsion, it would be inevitable that the least stable and least mentally matured and responsible members of both races would become the most intemperate and the most aggressive. This would give rise to innumerable and continuous incidents, and intolerable public tension.

There are profound psychological and cultural differences, including differences in aptitudes, between the white and negro races in Alabama which should not be ignored in dealing realistically with as sensitive a problem as that of education. Those defferences will not be ignored except by those determined on mechanical social integration as a dominant end however punitive or disastrous its consequences.

The opinion of the Supreme Court in the school segregation cases refers to the probability of adverse psychological effects of segregation upon negro children. This Committee believes that assumption to be conspicuously false in fact, so far as conditions in this State are concerned, as well as beyond the proper function of the judiciary. Negroes in Alabama are accustomed to living separately, which is the normal environment. Under the actual conditions in Alabama, the exact effect which the Court assumed as to segregation, would, on the contrary, result from forced integration, namely, the negro children would be harmed and warped by belligerent resentment of their forced acceptance, by innumerable daily incidents emphasizing it, and by the sharp disclosure of a generally lower scholastic aptitude.

Furthermore, it is indisputable that the reaction to compulsory integration would result in such continuous and widespread incidents and friction as to be subversive of the training and education of white and negro children alike. The resistance and the difficulties which have already been encountered in Delaware and elsewhere would arise in this State in far more acute form, and in every school. Proper and effective education cannot take place in an abnormal and unwholesome atmosphere of tensions and recentment.

A further certainty is that compulsory education would be unthinkable and would have to be abandoned. The notion that white parents in Alabama could be prosecuted, as now proposed by the Governor of Delaware, for not compelling the attendance of their children in an integrated school would be on its face intolerable and impossible here.

Schools, particularly elementary and secondary schools, are so intimately related to the customs and personal feelings of the people of each community that their operation is not possible except in conformity with community opinion. In the

judgment of the Committee, there is no community in the State in which prevailing opinion among responsible officials, leaders and citizens would support compulsory integration in the schools.

Based upon its inquiries and from its general knowledge of the people of the State, the committee believes that elected officials and peace officers would be almost without exception unwilling or unable to exert effective measures to enforce compulsory integration or to prevent disorder if it were attempted.

The exodus from integrated schools by the white people, who pay by far the greater part of the taxes which maintain the schools, would result in widespread reluctance or refusal to continue that contribution. It is certain that the public in most if not all districts, would refuse to vote the necessary taxes to sustain a program of compulsory integration.

The problem of assignment of white and negro teachers to mixed schools would also present almost insoluble difficulties and resistance, and recruitment of white teachers, already a serious problem, would be adversely affected.

In short, the committee finds that forced integration even in the improbable event that it could be made effective at all, without substantially impairing the public school system and assuring public friction and disorder, would be harmful and contrary to the best interests of both white and negro children as well as a constant threat against the growth and administration of the public schools.

The foregoing comments as to the adverse social, economic, psychological and educational effects of any attempt to coerce racial integration in the schools are based upon unavoidable recognition of the organic social and cultural structure of this State. Separation of the races at the social and marriage level is not merely an empty tradition or a prejudice. It is a necessity in the preservation of civil order and good will, and it is a part of the fundamental fabric of our society. So far as the Commitee is aware, that basic ordering is not presently threatened with a further act of revolutionary repudiation by the Court.

Considered from the standpoint of the right of free citizens of all races to control their social and personal contacts,

relations and environment, the people of Alabama might be willing to concede the right of white and negro families to send their children to mixed public schools within any appropriate school district where the qualifications for admission might be consistent with the school program, and where the arrangement should be acceptable to the community and its taxpayers; but compulsory attendance at a mixed school, inevitably resulting in friction, disorder and bad feeling, is another thing entirely.

The decision of the Supreme Court has been interpreted by the professional advocates of integration as a mandate for compulsory integration, without respect to other factors of which interpretation of the Fourteenth Amendment has always taken cognizance, notably the general police power of the State. But where, as here, friction is inevitable, the Court has not intimated that the State must nevertheless integrate the races in any given school at the choice of one but over the protest of the other.

Nor has the Court intimated, as some appear to assume, that negroes are to be free to choose, but that white people have no choice and must be compelled to attend mixed schools against their wills. The committee is unwilling to accept any such conclusion, and the people of Alabama will not accept it.

A procedure based upon the principle of freedom of choice, that is freedom not to attend a mixed school, firmly administered, is essential not only to sustain personal and social freedom in Alabama. It is necessary in order to avoid imposing on the educational personnel the unprecedented problems of punitive discipline to suppress disorder at school, and friction with parents, and dealing with "incidents", the occurrence of which is so assured and would be so extensive as to confuse or subordinate the function of education in the mixed school to a police or correctional program.

It is obvious that no course in education can supply our teaching forces with the training for those hybrid functions, and that the profession of education as thus distorted would not attract those with the sensitive and intellectual qualities so essential to the mission of education.

II. The Proposed Constitutional Amendments

The constitutional changes proposed by this report are based upon the foregoing fundamental considerations. They do not require any radical change in the public school system of the State. The main objective of the proposals is to give the authority to the legislature to assure the recognition by our school authorities of the right of white people, as well as negro people, to elect to attend schools of their own race and to make possible the application of tests and standards which must be met before mixed schools can be operated at all for those willing to attend them.

But these changes will make plain the determination that the schools and children of Alabama will not be made the instrument of compulsory integration or misconceived social reforms.

Rather than allow any such tragic distortion of the function of public education, that function should be abandoned to the event necessary to protect it in any locality.

In the event, therefore, that any form of coercion should threaten to bring about that result, the Committee recommends that the State announce, through its Constitution, the disclaimer of any right of any person to demand that the State operate educational facilities for his benefit except subject to such conditions as the State may approve as consistent with harmony, efficiency and good order.

There is no right under the Constitution of the United States to an education at public expense. Alabama should also disclaim any such compulsion, making plain the desire of its citizens to promote the education of its children, but not at the expense of tension, disorder, the violation of ingrained traditions and the clear risk of psychological damage to children of both races.

Present constitutional provisions are inflexible in requiring State ownership and operation of public schools as the only method of public promotion of education, thus subjecting the entire system and every school in it to the possible impact of the decision of the Supreme Court, and making impractical the grant of State aid to pupils in private schools in localities where state operated mixed schools would otherwise be unavoidable. This consequence would not only be compulsory general integration in the area, but parents financially unable

to send children to private schools would under our present system of compulsory education be punishable criminally who might be unwilling to expose their children to the inevitable disturbances of the mixed school.

The power should be delegated by the legislature to the local school authorities as a final resort to discontinue public schools and, instead, grant public aid, such as tuition and transportation, directly to the pupils, white and negro, and enable them to attend private schools where, of course, there would be no compulsory commingling. This could be done without impairment of teachers' tenure, pensions or other rights.

This procedure would be a last resort. The provision of fully adequate schools for negroes, screening under the State's power to avoid social tension or friction, and allocation by school authorities of pupils with markedly different scholastic aptitudes to different schools in order to avoid impairment of school curricula and educational standards, should go far to meet the problem. Supported by the good sense of the negro people, these procedures will reduce the number of school districts in Alabama in which belligerent non-conformity to custom and threatened disorder would make it necessary to consider substitution of the subsidy system instead of normal public ownership and operation.

To make possible that essential flexibility the proposals made by the Committee include the following:

1—Amend Section 256 of the Constitution so as to eliminate the express prohibition against the operation of mixed schools, attended by both races; but at the same time make clear that the State will not undertake to coerce anyone to attend mixed schools against his will, and will not be obligated to operate any such mixed schools at all. The amendment would also emphasize as the State's basic educational policy the fostering of education, but only to the extent of the available revenues of the State, and subject to the exercise of its police power to assure harmony and good order as the background for the education of Alabama children.

Within that broad framework of basic policy, the legislature would be free to provide for public education, or public assistance of pupils in procuring private education, as conditions might justify or require.

The amendment would, therefore, eliminate the mandate that the legislature must provide public schools for everybody between the ages of 7 and 21. It would imply no impairment at all of educational aid or any abandonment of direct operation of schools by public authority except in areas where the belligerence of agitators might force consideration of that procedure, after every reasonable exercise of discretion and authority to avoid it.

It must be borne in mind that conditions and requirements may vary widely in different counties and school districts. The legislature should have the greatest possible freedom to provide or authorize the School Boards to provide for the various sections in ways best suited to local conditions, after local authorities have exercised their screening powers to avoid impairment of educational function, social friction and potential disorder inconsistent with the education of youth.

2—Amend Sections 137 and 139 to give the legislature broader authority to assure consistency of policy in conserving order and harmony and in asserting the paramount police power of the State by providing for participation by the Attorney General in any litigation involving any public school or any State or local school board or official; and to provide for the exercise of judicial functions by school officials in connection with school matters, such as the eligibility, admission and allocation of pupils, including the power to refuse admission to individuals or groups whose deficiencies in scholastic aptitude would compel undue lowering of school standards in order to be within the scholastic capacity of sub-average groups, and where order and harmony would be threatened for any reason.

The appropriate findings of school authorities in such matters, being judicial in character, would not subject the authorities to personal liability or harassment.

3—Amend Sections 258, 259, 260, 269, and 270, to bring about consistency, and to broaden the legislative authority with respect to the expenditure of public funds, so that tax and other revenues can be appropriated to the support and furtherance of education in other ways than by the operation of public schools to which the apropriation of public funds is,

The Committee wishes to emphasize the fact that the proposed constitutional amendments do not require a revolutionary change, or, in fact, any change whatsoever in the present organization of the public schools. Rather they propose to give to the legislature a broader and more flexible and realistic authority than it now has, to deal with the problems of education in the State, in alternative ways, to meet changing or varying circumstances and in accordance with the currently expressed will of the electorate. The Committee urges that this authority be given as promptly as practicable so that the legislature will be in a position to deal promptly and efficiently not only with prospective conditions but with any developed emergency.

III—No Immediate Legislation Proposed

The Committee has considered various specific legislative proposals which would deal more broadly and definitively with various aspects of the problem of school segregation, but does not recommend the present adoption of any formula other than submission of the constitutional amendments as promptly as practicable.

Assuming as a matter of course that all State school authorities recognize their grace and current responsibility to avoid public disorder and possibly tragedy through the premature of any adverse precedent whatever, and that they will see to it that no mixing of the races is permitted, and that all efforts to force that result are firmly dealt with, specific legislation may properly await further study of the administrative and fiscal problems which may be involved, after the general scope of the Supreme Court's decision has been clarified in the pending proceedings and we are advised as to the extent to which trouble makers in Alabama propose to foment litigation and stir up a hostility between the races which does not now exist.

The legislative solutions can be readily developed if the necessary constitutional authority is provided as the Committee recommends.

The protection of rights of tenure and of the retirement system for teachers who might me affected by discontinuance of schools or otherwise, and like problems, can be solved with-

out material difficulty.

In conclusion, we express our conviction that the public support and furtherance of education can and should be maintained in a manner acceptable to the vast majority of citizens who, in the end, make it possible; and it can be maintained without permitting the function of education of children in Alabama to be converted into a mechanism for compulsory and violent social reform.

The Committee takes occasion to acknowledge the constructive contributions to its study by prominent educators and by the Alabama Bar Association through its able committee headed by Joseph F. Johnston. The Committee is also grateful for the cooperation of Governor Gordon Persons, and the Legislative Reference Service and the Legislative Council. The Committee herewith acknowledges with thanks the suggestions of several thousand citizens whose deep interest prompted letters of advice and encouragement.

Respectfully submitted,

Albert Boutwell, Chairman
J. Miller Bonner
Herbert Byars
Robert G. Kendall, Jr.
Ira D. Pruitt
Jack C. Gallalee

October 18, 1954

PROPOSED CONSTITUTIONAL AMENDMENTS AMEND THESE SECTIONS OF THE ALABAMA CONSTITUTION OF 1901, RESPECTIVELY, SO THAT THE SAME SHALL READ AS FOLLOWS:

Section 137. The attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, and commissioner of agriculture and industries shall perform such duties as may be prescribed by law. The state treasurer and state auditor shall, every year, at a time fixed by the legislature, make a full and complete report to the governor, showing the receipts and disbursements of every character, all claims audited and paid out, by items, and all taxes and revenues collected and paid into the treasury, and the sources thereof. They shall make reports oftener upon any matters pertaining to their offices if required by the governor or the in general, presently limited by law.

legislature. The attorney-general, state auditor, secretary of state, state treasurer, and commissioner of agriculture and industries shall not receive to their use any fees, costs, perquisites of office or other compensation than the salaries prescribed by law, and all fees that may be payable for any services performed by such officers shall be at once paid into the state treasury. The legislature may require the attorney-general to defend any or all suits brought against the state, or any subdivision thereof, or against any state school board or state board of education, or against any county or city school board or board of education, or against like boards or commissions by whatever name designated, or against any members, officers or employees of any such boards, or against any school official or employee throughout Albamama.

Section 139. The judicial power of the state shall be vested in the senate sitting as a court of impeachment, a supreme court, circuit courts, chancery courts, courts of probate, such courts of law and equity inferior to the supreme court, and to consist of not more than five members, as the legislature from time to time may establish, and such persons as may be by law invested with powers of a judicial nature; but no court of general jurisdiction, at law or equity, or both, shall hereafter be established in and for any one county having a population of less than twenty thousand, according to the next preceding federal census, and property assessed for taxation at a less valuation than three million five hundred thousand dollars. The legislature shall also have authority to constitute as judicial officers any or all of the members of state school boards, state boards of education, county school boards, city school boards, and like boards or commissions by whatever name designated, and all superintendents of schools and school officials and employees throughout Alabama, and to provide that all action taken by them, or any of them, requiring the exercise of discretion or judgment in connection with school matters be judicial action.

Section 256. It is the policy of the State of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing

in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.

The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the State for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the State or any municipality shall not be donated for educational purposes except to non-profit charitable or eleemosynary corporations or associations organized under the laws of the State.

To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.

Section 258. All lands or other property given by individuals, or appropriated by the State for education purposes, and all estates of deceased persons who die without leaving a will or heir, shall be used or applied to the furtherance of education

Section 259. All poll taxes collected in this State shall be applied to the support and furtherance of education in the respective counties where collected.

Section 260. The income arising from the sixteenth section trust fund, the surplus revenue fund, until it is called for by the United States government, and the funds enumerated in sections 257 and 258 of this constitution, together with a special annual tax of thirty cents on each one hundred dollars of taxable property in this state, which the legislature shall levy, shall be applied to the support and furtherance of education, and it shall be the duty of the legislature to increase the educational fund from time to time as the necessity therefor and the condition of the treasury and the resources of the state may justify; provided, that nothing herein contained shall be

so construed as to authorize the legislature to levy in any one year a greater rate of state taxation for all purposes, including schools, than sixty-five cents on each one hundred dollars' worth of taxable property; and provided further, that nothing herein contained shall prevent the legislature from first providing for the payment of the bonded indebtedness of the state and interest thereon out of all the revenue of the state.

Except as they may be specifically set aside in trust funds or otherwise applied to the payment of indebtedness, all proceeds of income or other taxes levied by the state, and of all special ad valorem or other taxes levied by counties and other municipalities, or school districts, pursuant to the constitution as heretofore amended, for public school purposes, shall be applied to the support and furtherance of education pursuant to Section 256 of the constitution, as amended.

Section 269. The several counties in this state shall have power to levy and collect a special tax (a) not exceeding ten cents on each one hundred dollars of taxable property in such counties, for the support and furtherance of education in such manner as may be authorized by the legislature; provided, that the rate of such tax, the time it is to continue, and the purpose thereof, shall have been first submitted to a vote of the qualified electors of the county, and voted for by three-fifths of those voting at such election; but the rate of such special tax shall not increase the rate of taxation, state and county combined, in any one year, to more than one dollar and twenty-five cents on each one hundred dollars of taxable property; excluding, however, all special county taxes for public buildings, roads, bridges, and the payment of debts existing at the ratification of the constitution of eighteen hundred and seventy-five.

Section 270. The provisions of this article and of any act of the legislature passed in pursuance thereof for educational purposes, shall apply to Mobile county only so far as to authorize and require the authorities designated by law to draw the portions of the funds to which said county shall be entitled for school purposes and to make reports to the superintendent of education as may be prescribed by law; and all special incomes and powers of taxation now authorized by law for the benefit of public schools in said county shall remain undisturbed until otherwise provided by the legislature.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 341

RUBY FREDRICKA SHUTTLESWORTH, by her next friend,
F. L. SHUTTLESWORTH, ET AL., *Appellants*,

v.

BIRMINGHAM BOARD OF EDUCATION, *Appellee*.

On Appeal From the United States District Court for the Northern District of Alabama

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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Attorneys for Appellee.

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OPINION BELOW

The opinion of the District Court is reported in 162 F. Supp. 372.

NOTE: Appellee is improperly designated in the pleadings below and in the jurisdictional statement herein as "Birmingham Board of Education

of Jefferson County, Alabama." The proper designation is Birmingham Board of Education which is an agency of the City of Birmingham, and not of Jefferson County.

MOTION TO DISMISS

Appellee moves for a dismissal of this appeal in accordance with Rule 16 of the Revised Rules of this Court.

The appeal should be dismissed for want of jurisdiction. This is not a proper case for a three judge court, and hence not directly appealable, for the reason that the Alabama Act, the constitutionality of which is the sole issue in the case, is patently valid on its face, no questions of unconstitutional administration are presented, and such questions, in any event, are not within Section 2281 of the Judicial Code.

The unanimous judgment of the three judge District Court is of course effective, as the court noted, but only as the judgment of a regular district court, and hence appealable only to the Circuit Court.

MOTION TO AFFIRM

The Constitutional Question Urged is Premature and Abstract

Appellee moves in the alternative for an affirmance of the judgment of the District Court in accordance with Rule 16. This appeal is so lacking in substantial basis in the record as to require summary affirmance, if not dismissal. It seeks a determination by this Court that an Alabama statute dealing with the assignment and placement of pupils in public schools is "unconstitutional on its face," without the slightest effort to show that even if that were the case, the appellants would be entitled to any judicial relief.

The appellants, in submitting their case below, expressly disclaimed any purpose to prove application to them by appellee of any specific provision of the statute. Counsel for appellants said to the Court:

> "JUDGE RIVES: The point is, you are relying upon the statute itself and not the administration.
>
> MR. WASHINGTON: We are not relying on the administration. We are not talking about the application of the statute but the statute itself."
>
> R.....

At the time of submission for final decree the fact was that the placement law had in no sense been "enforced against plaintiffs, or administratively applied with respect to them. As the court below held:

> "It is possible for the Act to be applied so as to admit qualified Negro pupils to nonsegregated schools. . . . We cannot say, *in advance of its application,* that the Alabama Law will not be properly and constitutionally administered . . . the plaintiffs are not in position to show upon what particular ground they were not permitted to attend the schools of their choice."
>
> R. p. , 162 F. Supp. 381-2 (Emphasis supplied).

There would be and is adequate basis for the action or nonaction of the Birmingham School Board involved on this record, even in the absence or invalidity of the Placement Act, in the long established general school administration provisions of the Code of Alabama (1940, T. 52 §§ 151, 158), which the appellants do not attack, as the court pointed out (R. , 162 F. Supp. 378).

The District Court properly rejected the argument of appellants, repeated here (Jurisdictional statement

p. 13), that the placement law "freezes" the old compulsory segregation in the schools. Sections 2 and 3 of the statute do not have any such effect. Their clear intent and effect was merely to state a legislative admonition against too hasty re-shuffling of school populations, with attendant confusion, and to emphasize the responsibility of local Boards of Education to consider individual pupils in the light of the standards laid down.

The Supreme Court of Alabama has expressly rejected the argument that the Placement Act "froze" pupils in the schools previously attended, in *Ex Parte Board of Education of Blount County* (1956) 264 Ala. 34, 84 So. 2d 653, 656-7. The Court said:

> "Respondent contends that enactment of the placement bill froze every student in the school he had been attending previously, and further that local boards are thereafter prohibited from transferring any student or group of students without a finding by the board or its authority that such transfer is as to each individual pupil consistent with the test of the public and educational policy governing the admission and placement of pupils in the public school system prescribed by the act.
>
> We are of the opinion that repondent is mistaken only in his original premise: the Act was one designed to give the public school system flexibility, not rigidity; thus it did not so freeze pupils to their schools. Rather, it gave the local board full authority to place and replace students within its jurisdiction. The primary purpose of the Act was to fix responsibility for placement; the method chosen was the granting of wide discretionary powers to the local school board."

It should be noted that the *Blount County* case is also an effective answer to the contention of the appellants

that the sole purpose and effect of the legislation was the maintenance of segregation. The *Blount County* case involved a dispute wholly unrelated to the question of segregation. It emphasizes the completely unjustified character of this attempt to have the entire law declared invalid without regard to its application.

Furthermore, as the District Court pointed out (162 F. Supp. 383), the statute contains a severability clause which is given full effect under Alabama decisions, and appellants have no standing to attack particular sections in the absence of any proof that those sections have been applied against them.

The opinion of the District Court takes cognizance of the existence of the severability provision in the Act, and of the Alabama decisions giving effect to the presence of such a provision in the statute. Page 383, 162 F. Supp., citing *Alabama State Federation of Labor* v. *McAdory,* 246 Ala. 1, 18 So. 2d 810; *Opinion of Justices,* 247 Ala. 195, 23 So. 2d 505; *Newton* v. *City of Tuscaloosa,* 251 Ala. 209, 36 So. 2d 487. Such a provision is contained in Section 14 of the present Placement Law (appellants' "Appendixes", page 51a), reading as follows:

> "Section 14. The provisions of this Act are severable, and if any section *or provision* of this Act shall be held to be in violation of the Constitution of Alabama or of the United States, such decision shall not affect the validity of enforceability of the remainder of this Act." (Emphasis supplied).

Thus the intention of the Legislature is well expressed, that not only whole sections but component provisions are to be eliminated in order that the constitutionality of the Act be upheld.

Any prediction at this time as to what the Supreme Court of Alabama will hold relative to the validity or invalidity of any section, or provision (paragraph, sentence or clause), of the Act, and the effect of such invalidity, in a case properly presenting any application of a particular provision would be futile conjecture.

The Sole Issue Presented and Decided Below

The plaintiffs (appellants) not only failed to show application of any particular provision of the statute to them, but carefully avoided any effort to prove discrimination in fact with respect to their school assignments. As the court below points out:

> "The parts of the complaint denied by the defendant are those alleging discrimination against the plaintiffs, . . . As to such disputed parts of their complaint, the plaintiffs offer no evidence, but rely entirely upon the judicial knowledge of the Court. . ." R. p. ; 162 F. Supp. 375-6.

The plaintiffs' case was and is deliberately confined to the attempt to secure a declaration by the District Court, and now by this Court, of the unconstitutionality of the Alabama School Placement Law, Acts Regular Session 1957, Vol. 1, p. 482, however administered.

Although the appellants' jurisdictional statement states three other questions (pp. 3, 4), it seems clear that these are mere paraphrases of or arguments on the one question presented to and dealt with by the District Court, i.e. insistence on the inherent invalidity as an abstract proposition of the Alabama Placement Act as a whole, and on its face.

The Alabama School Assignment Laws Are Plainly and Wholly Consistent With the Brown Decision

The original school placement law was enacted by the Alabama legislature in response to the *Brown* decisions. A principal purpose was to repeal the provision of law which had been in effect for generations, requiring separate schools for the white and negro races. Gen. Acts 1955, p. 492, Sec. 10.

This was done in the face of the existing mandate of the Alabama Constitution, Section 256, and of course the action presumably was based on the acceptance of the effect of *Brown* as invalidating the constitutional and statutory provisions for mandatory racial separation. The Legislature doubtless considered that legislation became imperative to validate continued operation of public schools and the appropriations to maintain them.

Thereafter the Constitution of the state was also amended to eliminate compulsory segregation, (Section 256, copied in Note 8, 162 F. Supp. 379), after which the Placement Law was re-enacted with certain amendments not material here.

It is thus beyond possible ambiguity or debate that the Alabama constitutional and statutory scheme in its entirety, and the Placement Act in particular, authorize the operation by the State of integrated public schools. As the court below expressly held, "It is possible for the Act to be applied so as to admit qualified Negro pupils to nonsegregated schools." (R. , 162 F. Supp. 381)

This indisputable constitutional and statutory effect requires summary affirmance of the judgment.

We do not deny or attempt to minimize the shocked reaction of the legislature and people of Alabama to the decision in *Brown*. But that reaction does not impair the concrete action taken in responding to the decision by repealing the statutory mandate of segregation.

The legislation doubtless was and is also designed to lessen the shock and to prevent, so far as possible, undue and unnecessary disturbance and confusion in the educational system, and in social tranquillity; but appellants' argument as to the ulterior purpose or motive of the legislature is not supported by the facts or the text and was properly rejected by the court below. It is, furthermore, at best an assertion that the statute may be improperly and unconstitutionally administered, as to which no proof was attempted.

The Alabama constitution and laws contain none of the mandatory provisions for separation, none of the prohibitions of the expenditure of public funds for nonsegregated schools, nor the compulsory closings of schools which were the basis for the invalidation of the Virginia laws in *School Board of Newport News* v. *Atkins*, 240 F. 2d 325 (4th Cir. 1957).

On the contrary, as held below, the Alabama statutory situation is very similar to that in North Carolina, sustained in *Carson* v. *Warlick*, 238 F. 2d 724 (4th Cir. 1956) cer. den. 353 U.S. 910 (1957), under which nonsegregated public schools are being operated. The basic statutory framework for administration of the Alabama school system was amended by this legislation to absorb or adjust to the shock of the *Brown* decision, primarily by decentralizing the responsibility for adjustments to each individual school district. The

obvious reason for this is the wide diversity of conditions and population characteristics which exist in Alabama, as in many other states, and the recognition of the importance of careful attention to the capacities and achievement levels of individual pupils, in making assignments.

The effort of the appellants in this case to have this Court invalidate the statutory plan of school assignment throughout the state of Alabama, without any showing of specific application or injury, is ill-conceived and mischievous in the extreme. Nothing could contribute more to bringing about a state of complete chaos than to have this Court pronounce the entire school administration system of a state invalid without reference to specific application in individual cases, at a time when there is already sufficient confusion and emotional tension in the area of public education. It is inconceivable that the Court should seriously consider any such effort.

No substantial constitutional or other question for decision here is presented by this appeal, and the judgment below should be summarily dismissed or affirmed.

Respectfully submitted,

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